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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

GOLDEN GATE HOTEL ASSOCIATION,

Petitioner,

v.

CITY AND COUNTY OF SAN FRANCISCO, et al.,

Respondents.

Petition For Certiorari To The United States Court Of Appeal For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. May claims brought under the Takings Clause of the Fifth Amendment be subjected to a statute of limitations not applicable to other constitutional claims, which permits enforcement of a facially unconstitutional law in perpetuity?

II. Does San Francisco's Residential Hotel Ordinance violate the Just Compensation Clause of the United States Constitution, by forcing certain hotel owners to devote their private property to the public purpose of housing the homeless, rather than imposing this civic burden on the taxpaying public as a whole?

PARTIES

The parties to this action are plaintiff Golden Gate Hotel Association (an unincorporated trade association), defendant City and County of San Francisco (a municipal corporation), defendant Tenderloin Housing Clinic (a not-for-profit corporation), defendant North of Market Planning Coalition (a not-for-profit corporation), and Bradford Paul (an individual). None of the corporate parties have either parent companies or subsidiaries.

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PETITION FOR A WRIT CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeal for the Ninth Circuit entered in this proceeding.

CITATIONS TO OPINIONS BELOW

The two opinions of the Ninth Circuit Court of Appeal and the two opinions of the United States District Court rendered in this action appear in the appendix hereto.

JURISDICTION

The decision of the United States Court of Appeal for the Ninth Circuit was filed on January 23, 1996. This petition is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Article III Section One and Section Two, Subsection One

Section 1. The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and the inferior Courts, shall hold their Offices during good Behavior, and shall, at stated times, receive for their

services a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. [1] The judicial power shall extend to all cases, in Law and in Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases effecting Ambassadors, other public ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; – to controversies to which the United States shall be a Party; to controversies between two or more different States; – between a State and Citizens of another State; – between Citizens of different States; between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or Citizens thereof, and foreign States, Citizens or Subjects.

Constitution of the United States, Amendment Five

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War, or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

I. INTRODUCTION

This case involves a constitutional Takings Clause challenge to a San Francisco ordinance which requires certain landowners to place their private properties in public service as single room occupancy residential hotels for indigents, without payment of any compensation. As set forth in greater detail below, the district court held the ordinance to be facially violative of the Fifth Amendment to the United States Constitution because it forced some hotel owners alone to bear burdens which in justice and fairness should be borne by society as a whole.

On appeal, the Ninth Circuit did not reach the merits of plaintiff's facial constitutional challenge. Instead, the circuit court ruled that plaintiff's facial constitutional challenge was time barred because it was not brought within one year of enactment of the ordinance. Thus, the facially unconstitutional ordinance could be enforced in perpetuity.

The rule which the Ninth Circuit applied to reach this conclusion was one which distinguished Takings Clause cases from all other constitutional cases, and accorded Takings cases the status of a poor relation. The rule also violates Article III of the United States Constitution, by impinging upon the federal courts' jurisdiction to decide cases arising under the constitution.

Petitioner will ask this Court to grant certiorari to disapprove this rule, and to reinstate the judgment of the district court holding the Residential Hotel Ordinance to be violative of the Fifth Amendment to the United States Constitution.

II. COMMENCEMENT OF THE ACTION

In September of 1991, the Golden Gate Hotel Association, a trade association of smaller San Francisco hotels, acting through its President, Brigadier General William B. Kunzig, U.S. Army (Ret.), brought suit against the City and County of San Francisco (the "City") and certain related parties in federal district court. The primary relief sought in the action was a declaration that San Francisco's Residential Hotel Unit Conversion and Demolition Ordinance (San Francisco Administrative Code Chapter 41) ("the Ordinance" or "the Residential Hotel Ordinance") was facially violative of the Takings Clause of the Fifth Amendment of the United States Constitution.

The challenged Ordinance was designed for the stated purpose of preserving the City's supply of low rent residential hotel rooms, which housed indigent, elderly, mentally ill, and other similarly situated persons. (Section[1] 41.2) Characterizing cheap hotel rooms as an "endangered housing resource" (section 41.3(f)), the Ordinance operates by designating certain hotel rooms as "residential", based on their use on September 23, 1979, and prohibiting rental of these rooms to travelers on a nightly basis. (Sections 41.4(q), 41.20)

If a property owner wishes to convert residential designated hotel rooms to tourist use, or any other use, he is required to either supply an equal number of replacement residential hotel rooms, or pay the City an "in lieu fee" equal to the cost of a site for a replacement

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[1] All "section" references denote the Residential Hotel Ordinance unless otherwise noted.

residential hotel plus eighty percent of the cost of constructing the replacement hotel. (Sections 41.12 and 41.13)

The most recent version of the Ordinance expressly states that the in lieu fee has been increased from forty percent of construction costs plus site acquisition costs, to *eighty* percent of construction costs plus site acquisition costs, due to a shortfall in tax dollars available to fund low income housing: "[Forty] percent of the cost of construction of comparable units plus site acquisition costs, has not been adequate to provide replacement units. Federal, state, and local funds were incorrectly assumed at that time to be available and sufficient to make up the shortfall between the forty percent in lieu fee and actual replacement costs. For example, in 1979 the federal government was spending 32 billion dollars on housing and is spending only 7 billion dollars in 1989." (Section 41.3(m))

Needless, to say, the economic impact of the one-for-one replacement and in lieu fee provisions of the Residential Hotel Ordinance is to entirely prohibit conversion of residential designated hotel rooms to other uses.[2]

The Ordinance also requires the owners of hotels with rooms designated "residential" to perform certain acts not required of other hotel owners. The Ordinance requires them to, *inter alia*, prepare special daily, weekly, and annual occupancy reports, to post the weekly

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[2] Remarkably, even an act of god, such as a fire or earthquake, will not release a property owner from the residential hotel business. If a residential hotel is destroyed by an act of god, the City will issue a building permit for the site only if the owner agrees to provide a replacement residential hotel. (Section 41.8)

reports, to make all of the reports available to housing inspectors and the general public, and to refrain from lessening the services provided to residents at the hotels. (Sections 41.9-41.11, 41.20(2)) If a hotel owner wishes to apply for the privilege of renting a few extra rooms to tourists during the summer, he is required to jump through hoops in an administrative proceeding each year to demonstrate that he diligently provided housing for the poor during the prior winter months. (Section 41.19)

To aid hotel owners in dispatching their public duties, the City Attorney's Office prepared and made available a manual covering such subjects as how to deal with psychotic residents, and precautions to prevent janitorial employees from contracting AIDS from residents.

Heavy civil and criminal penalties are imposed for violation of the Ordinance. (Sections 41.11, 41.20) Nonprofit housing advocacy groups are deemed "interested parties" with standing to seek civil penalties under the Ordinance. (Sections 41.4(h), 41.10(1)). Radical tenant advocacy groups, particularly defendant Tenderloin Housing Clinic, have in fact made a lucrative business of harassing hotel owners, both through administrative proceedings and through the courts.

III. DECLARATION OF UNCONSTITUTIONALITY AND INJUNCTION

Within several months of commencement of this action, the parties filed cross-motions for summary judgment on the merits, and their motions were argued and taken under submission. Two months after the cross-motions were submitted for decision, defendants filed a

second summary judgment motion which, for the first time, asserted the statute of limitations as a basis for summary judgment.

In June of 1993, the federal district court ruled on the pending cross-motions for summary judgment. The court declared the Ordinance to be facially violative of the Takings Clause of the Fifth Amendment to the United States Constitution. As for defendants' second motion for summary judgment, asserting the statute limitations, the court struck the motion on the ground that it was not timely filed.

In striking down the Ordinance, the district court emphasized that the law did not pass constitutional muster because it forced "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole", in violation of the principles enunciated by this Court in *Armstrong v. United States*, 384 U.S. 40 (1959). "The Ordinance illogically places the blame for the social ill of homelessness on the shoulders of residential hotel owners; it singles out a few to bear the costs which should be borne by the many – a constitutionally impermissible governmental act."

The district court also observed that the Ordinance failed the "nexus" Takings test enunciated by this Court in *Nollan v. California Coastal Commission*, 94 L.Ed.2d 697 (1987). Quoting from the New York Court of Appeals' decision in *Seawall Associates v. City of New York*, 542 N.E.2d 1059, 1069 (1989), which struck down a New York City Ordinance virtually identical to the San Francisco Ordinance at issue, the district court opined that "the nexus between the obligations placed on [residential hotel] property owners and the alleviation of the highly

complex social problem of homelessness is indirect at best and conjectural. Such a tenuous connection between means and ends cannot justify singling out this group of property owners to bear costs required by the law toward cure of the homeless problem."

The district court summarized its holding observing: "Plaintiffs, hotel owners, voluntarily provided some low-income housing by operating their properties on a residential basis for a period of time. Rather than commending the hotel owners for their efforts to help low income individuals, defendant San Francisco enacted the Residential Hotel Ordinance, effectively placing plaintiffs into perpetual servitude by forcing them to remain in the residential rental business and preventing them from changing businesses. Such an ordinance is impermissible under the constitution."

Following motions for rehearing, the district court, on September 9, 1993, made some minor modifications to its opinion, and issued a judgment and injunction enjoining enforcement of the Ordinance. Several days later, the district judge died. The case was subsequently reassigned.

IV. APPEALS TO THE NINTH CIRCUIT

Following entry of the judgment and injunction, the City and its codefendants appealed to the Ninth Circuit. On appeal, they urged, *inter alia*, that the district court had abused its discretion by refusing to entertain their late filed second summary judgment motion, asserting the statute of limitations.

On March 18, 1994, the Ninth Circuit issued an opinion holding that the district court had indeed abused its discretion by striking defendant's second motion for summary judgment. The panel reasoned that defendants' failure to file a motion raising the statute of limitations defense at an earlier date was excusable because controlling Ninth Circuit law was in a state of flux. Specifically, prior to publication of the Ninth Circuit's revised opinion in *Azul Pacifico v. City of Los Angeles*, 973 F.2d 704 (9th Cir. 1992) ("*Azul II*"), aggrieved parties were permitted to bring Takings claims directly under the United States Constitution, subject to a liberal statute of limitation. Following publication of that opinion, they were prohibited from bringing their Takings claims directly under the Constitution, and instead required to bring them under 42 U.S.C. section 1983, subject to a one year statute of limitation. Thus, the Ninth Circuit reasoned, defendants were justified in delaying assertion of their statute of limitations defense on summary judgment, until after publication of the revised opinion in *Azul* showed them the strength of the defense.

Having ruled that the district court abused its discretion by refusing to consider the statute of limitations question on its merits, the circuit court remanded the case to the district court, with instructions for that court to consider and decide the statute of limitations issue. (See *Golden Gate Hotel Association v. City and County of San Francisco*, 18 F.3d 1482 (9th Cir. 1994))

On remand, the district court granted summary judgment for defendants. The district court applied the Ninth Circuit precedents of *De Anza Properties X, Ltd. v. County of Santa Cruz*, 936 F.2d 1084, 1085 (9th Cir. 1991), *Azul-Pacifico, Inc. v. City of Los Angeles*, 973 F.2d 704 (9th Cir.

1992), and *Levald v. City of Palm Desert*, 998 F.2d 680 (9th Cir. 1993), to hold that all facial constitutional challenges to a law must be brought pursuant to section 1983, within one year of the challenged law's enactment.

Plaintiff appealed to the Ninth Circuit. On January 23, 1996, the Ninth Circuit affirmed, citing *Azul II* and *Levald, supra*. The circuit court opined that it made no difference that plaintiff was seeking a declaration of unconstitutionality and injunctive relief rather than monetary damages: "recasting a complaint to seek declaratory or injunctive relief will not circumvent the statute of limitations."

The impact of the Ninth Circuit's ruling is to empower the City of San Francisco and such other "interested parties" as the Tenderloin Housing Clinic to enforce a facially unconstitutional law in perpetuity, immune from judicial review. By so holding, the Ninth Circuit undermines the very structure of constitutional review, which is critical to the balance of powers established by our federal constitution.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO HOLD THAT A CHALLENGE TO A LAW FACIALLY VIOLATIVE OF THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT MAY BE BROUGHT AT ANY TIME.

1. Introduction to Statute of Limitations Issue

It has long been the practice of this Court to strike down facially unconstitutional laws and prohibit their

enforcement, without regard to the date of their enactment. For example, in *Griswold v. Connecticut*, 381 U.S. 479 (1964), this Court struck down and enjoined enforcement of an 1879 Connecticut law prohibiting the use of contraceptives. In *Loving v. Virginia*, 388 U.S. 479 (1964), this Court struck down and enjoined enforcement of a 1924 miscegenation statute. Quite recently, in *Forsyth County v. Nationalist Movement*, 112 S.Ct 2395 (1992), this Court struck down a facially unconstitutional parade ordinance which was more than a year old when it was first challenged. None of these cases make any mention of section 1983 or a statute of limitation.

Viewed in this context, the line of Ninth Circuit cases holding that a law facially violative of the Takings Clause of the United States Constitution may be enforceable in perpetuity if it is not challenged under 42 U.S.C. section 1983 within one year of its enactment, appears as a radical departure from this Court's precedent. As demonstrated below, it is also an improper abdication of the constitutional review function which Article III prescribes as a duty of the federal courts.

2. Development of Ninth Circuit Case Law Governing Statute of Limitations in Takings Cases

The development of the line of Ninth Circuit cases which led to the conclusion that a law facially violative of the Constitution's Takings Clause may be enforced in perpetuity if not challenged within one year, bears examination. The line of cases began with *DeAnza Properties X, Ltd. v. County of Santa Cruz*, 932 F.2d 1084 (9th Cir. 1991). *DeAnza* involved a facial constitutional challenge to a trailer park rent control law. On appeal, the Ninth Circuit

affirmed the district court's dismissal on statute of limitations grounds, holding that plaintiff landowner's cause of action accrued when enactment of the rent control law diminished the value of the property involved. Inasmuch as the statute of limitation for section 1983 claims originating in California was one year, and plaintiff failed to sue within one year of the law's enactment, the claim was time barred.

The next pertinent opinion came in November of 1991, when the Ninth Circuit published its original opinion in *Azul Pacifico v. City of Los Angeles*, 948 F.2d 575 (9th Cir. 1991) ("*Azul I*"). In *Azul I*, plaintiffs were trailer park owners who sued seeking monetary damages when a local law enabled their tenants to occupy space in the trailer parks at below market rates and even sell this right to others. Because plaintiffs sued more than one year after the law was enacted, defendant Los Angeles asserted a statute of limitations defense.

The Ninth Circuit ruled that although plaintiffs' claims under section 1983 were time barred, they could nevertheless sue directly under the federal constitution and thus enjoy a more liberal statute of limitation. In support of the proposition that a property owner could bring a Takings claim directly under the constitution, the *Azul I* Court cited *Jacobs v. United States*, 290 U.S. 13, 16 (1933). The *Azul I* Court also noted this Court's opinion in *First Lutheran Church v. Los Angeles County*, 482 U.S. 304, 315 (1987), holding that the Fifth Amendment Takings Clause is "self-executing", and a Fifth Amendment Takings claim "grounded in the Constitution itself."

After concluding that plaintiffs' claim was not time barred, the *Azul I* panel went on to decide the merits in

the plaintiffs' favor. The *Azul* panel relied on a physical taking theory based on the reasoning of *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1986).

Then, the following year, this Court issued its opinion in *Yee v. City of Escondido*, 112 S.Ct. 1522 (1992), overruling the physical taking theory enunciated in *Hall v. City of Santa Barbara, supra*. The *Azul* panel accordingly granted rehearing. Rather than reconsider the merits of the plaintiffs' claims in light of *Yee*, the *Azul* panel instead suddenly asserted that plaintiffs had *no* direct cause of action under the constitution. (*Azul II, supra*, 973 F.2d at 705) All references to this Court's decisions in *Jacobs* and *First Lutheran Church, supra*, were dropped from the opinion. No explanation for the change of position was offered. The case was dismissed, applying a one year California section 1983 statute of limitation.

The Ninth Circuit's next opinion concerning the statute of limitation for Takings claims was *Levald v. City of Palm Desert*, 998 F.2d 680 (9th Cir. 1993). *Levald* elaborates upon the Circuit's rationale for creating a special statute of limitation applicable only to facial Takings claims, and explicitly expands the rule to encompass claims for declaratory relief:

> Levald argues that because in other contexts the Supreme Court has allowed challenges to statutes long after they were enacted, Levald should be allowed to bring an action challenging the enactment of a statute as a taking without just compensation at any point. This argument misapprehends the differences between a statute that effects a taking and a statute that inflicts some other kind of harm. In other contexts, the harm inflicted by the statute in continuing or

> does not occur until the statute is enforced – in other words, until it is applied. In the takings context, the basis of a facial challenge is that the very enactment of the statute has reduced the value of the property, or has effected the transfer of a property interest. This is a single harm, measurable and compensable when the statute is passed. Thus, it is not inconsistent to say that different rules adhere in the facial takings context and other contexts.

(*Levald supra*, 998 F.2d at 688)

The *Levald* Court went on to opine that it made no difference whether the claim was for declaratory relief or monetary damages: "Whether styled as a claim for damages or as one for declaratory judgment, the facial challenge is time barred." (*Levald, supra*, 998 F.2d at 688-89)[3]

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[3] The case of *Carson Harbor Village Ltd. v. City of Carson*, 37 F.3d 486 (9th Cir. 1994), though technically not a statute of limitations case, demonstrates the natural consequences of the logic employed in *Levald*. The plaintiff in *Carson Harbor* was yet another trailer park owner, this time subject to a mobile home park anti-conversion ordinance analogous to San Francisco's residential hotel anti-conversion ordinance. The mobile home park conversion ordinance in *Carson Harbor* functioned in conjunction with a mobile home rent control law which prohibited rent increases even when the lessee vacated. Citing *Levald*, the Ninth Circuit held that the property owner had no standing to challenge the facial constitutionality of the two laws because they were enacted before plaintiff purchased the trailer park, and plaintiff accordingly suffered no injury as the impact of the laws was factored into the price he paid for the property.

3. Deficiencies in the Ninth Circuit Rule

a. Holding That Takings Claims Must Be Asserted Under Section 1983

In the year 1803, United States Chief Justice John Marshall, speaking in the landmark case of *Marbury v. Madison*, 2 L.Ed. 60, 73-74 (1803), opined that it was the province and duty of the federal courts to pass upon the constitutionality of all legislative enactments, and strike down legislative enactments which did not comport with the constitution. An act "repugnant to the Constitution" was void and could not become the law of the land. Justice Marshall's opinion was amply supported by the language of the constitution itself, which provides that the "[federal] judicial power shall extend to all cases, at Law and in Equity, arising under this Constitution . . . " (U.S. Const., Art. III, section 2) From 1803 until the present day, the federal courts have exercised the right and duty to review the constitutionality of legislative enactments, and strike down those repugnant to the constitution.

As should be apparent from the foregoing, the constitutional review process is in no way dependent upon enactment of 42 U.S.C. section 1983, roughly three quarters of a century after this Court decided *Marbury v. Madison*. It cannot be said that prior to enactment of Section 1983, the United States Constitution was a dead letter, as useless as an automobile without a transmission. The Constitution did not lie dormant, like Sleeping Beauty, waiting for section 1983 to awaken it from a century's slumber.

Considered in its historical context, 42 U.S.C. section 1983 is simply a remedial statute enacted during the Reconstruction Period to aid in the enforcement of the Fourteenth Amendment. It is not an element of the constitutional review process mandated by Article III of our federal constitution and commenced by Chief Justice Marshall in *Marbury*. While the Fourteenth Amendment expressly authorizes Congress to pass legislation designed to aid in its enforcement, the Fourteenth Amendment, like every other provision of the constitution, is self-executing and subject to judicial interpretation and enforcement. Congressional enactments, such as 42 U.S.C. section 1983, can never contract the scope and effect of a constitutional provision, and cannot impair the power of the courts to strike down unconstitutional laws. (*Katzenbach v. Morgan*, 384 U.S. 641, n.10 (1966). See also J. Choper, *Congressional Power to Expand Judicial Definitions of the Substantive Terms of the Civil War Amendments*, 67 Minn. L. Rev. 299 (1982))

Consistent with the above, this Court has long held that the Fifth Amendment Takings Clause is effective without benefit of any act of Congress. An injured party may sue directly under the Takings Clause of the Fifth Amendment. (*Jacobs v. United States*, 290 U.S. 13, 16 (1933)) As this Court rather recently reiterated in the case of *First Lutheran Church v. Los Angeles County*, 482 U.S. 304, 315 (1987), the Fifth Amendment Takings Clause is "self-executing", and a Fifth Amendment Takings claim "grounded in the Constitution itself."[4]

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[4] See also *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), *Davis v. Passman*, 442 U.S. 228 (1979), and *Carlson v. Green*, 446 U.S. 14 (1980), holding

The Ninth Circuit's opinion following rehearing in *Azul II, supra,* is an *ipse dixit* which simply fails to deal with the foregoing controlling Supreme Court precedents cited in *Azul I.* It would appear that the panel, embarrassed by its prior opinion which resolved the merits employing a physical taking theory which did not meet with this Court's approval under *Yee,* hastily seized upon the expedient of a procedural bar to the merits of the Taking Claim. The procedural bar upon which the panel seized, however, upsets the entire balance of power in our constitutional system of government, by transferring from Article III courts to the legislative branch, the power to determine the scope – or even the possibility – of constitutional review. Carried to its logical extreme, the Ninth Circuit's approach would allow congress to abolish constitutional review entirely, by repealing section 1983.

This Court should grant certiorari to hold that the right to seek review of facially unconstitutional laws is not dependent upon any congressional enactment, and cannot be restricted by a legislative act or interpretation of such an act. This Court should hold that Article III of the United States Constitution itself imposes upon the federal courts, the right and the duty to review all claims asserting a law to be facially violative of any clause of the constitution, including the Just Compensation Clause of the Fifth Amendment.

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that plaintiffs may also sue directly under the Fourth Amendment, Eighth Amendment, and Fifth Amendment Equal Protection Clause.

b. Discrimination Against Takings Claims

In the recent case of *Dolan v. City of Tigard*, 114 S.Ct. 2309, 2320 (1994), this Court stated: "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or the Fourth Amendment, should be relegated to the status of a poor relation." Unfortunately, the Ninth Circuit has relegated Takings claims to precisely such a status.

By holding that Takings claims must be brought under 42 U.S.C. section 1983 and never directly under the United States Constitution, the circuit court has afforded Takings claims a status lower than that of search and seizure claims. (Compare *Azul II, supra*, with *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971))

The circuit court has also discriminated against Takings Claims by holding, in *Levald, supra*, that unlike all other facial constitutional challenges which may be brought at any time, facial challenges under the Takings Clause must be brought within a short time (in California, one year) of their enactment. The *Levald* Court's reasoning on this point is not persuasive.

Levald, following *DeAnza*, reasons that a law facially violative of the Takings Clause inflicts a one-time economic injury at the time of its enactment, by devaluing property. Thus, the statute of limitation should run from the date of the challenged law's enactment.

Petitioner respectfully disagrees with this reasoning. A law which violates the Takings Clause as applied – for example a law which downzones property in a manner

which is facially constitutional but interferes with a property owner's investment backed expectations to the extent of rendering the property worthless – may indeed inflict a one-time economic injury for which a statute of limitations could reasonably be imposed. This is analogous to requiring a party asserting a police brutality claim to sue within a fixed period after the beating.

Laws *facially* violative of the Takings Clause of the United States Constitution, however, do *not* simply inflict a one-time economic injury. They inflict a continuing injury which is not exclusively economic. San Francisco's Residential Hotel Ordinance provides an excellent illustration of this principle.

The San Francisco Residential Hotel Ordinance, on its face, purports to place private property in use for a public purpose, and to permit its return to private use only upon payment of a ransom. A law this frankly violative of the Fifth Amendment inflicts an injury to society simply by existing on the statute books.

Moreover, the Residential Hotel Ordinance inflicts a continuing injury by requiring property owners to perform specific acts on an on-going basis. As previously noted, the statute requires property owners to prepare daily logs, to prepare and publicly post weekly reports, and to prepare special annual reports accompanied by a substantial filing fee. The hotel owners are also affirmatively required to continue to provide whatever services were provided for hotel residents at the time of the Ordinance's enactment, and to never lessen those services. All of this inflicts a continuing injury.

The enforcement proceedings authorized by the Ordinance also inflict a continuing injury. As previously

noted, many of the hotel owners' private business records become public documents under the terms of the Ordinance. Because the Ordinance grants non-profit housing advocacy groups standing to sue to enforce its provisions, hotel owners are subject to repetitive and extortionate lawsuits brought by radical tenant advocacy groups with whom they have no contractual relationship. The hotels are truly treated as a public resource.

What is more, if the property owners *do* wish to ransom their properties which have been placed in public service, and return them to private use, they must participate in administrative proceedings to determine the ransom price. If they wish to avail themselves of provisions of the Ordinance which allow rental of extra tourist rooms in summer providing that the hotel has been heavily occupied on a residential basis during the winter, there are further administrative proceedings.

The bottom line is that the Residential Hotel Ordinance inflicts an on-going injury to hotel owners, who are eternally burdened by the affirmative acts which they are required to perform, to say nothing of harassment from radical tenant advocacy groups, and administrative proceedings under the Ordinance should they ever seek permission to rent rooms to tourists, even temporarily during the summer. The public is treated to the spectacle of on-going lawsuits and administrative proceedings conducted under the aegis of a law which is unconstitutional on its face.

Clearly, the only reason why the Ninth Circuit tolerates – indeed mandates – this state of affairs, is because it *does* relegate the Fifth Amendment's Takings Clause to

the status of a poor relation, inferior to other constitutional provisions. Imagine, for a moment, that another American city passed a law requiring all jews who were twenty-one years of age or older at the time of enactment of the ordinance, to pay a special one-time assessment, wear a gold star prominently displayed on their person, and refrain from practicing certain well compensated professions. Would any federal court hold that the statute of limitation to challenge such a law ran after one year because it inflicted a one-time injury and the persons affected all had the capacity to sue before the statute ran? Obviously not. The discriminatory law would undoubtedly be stricken whenever suit was commenced. The only reason why the Ninth Circuit reached a contrary result with respect to Takings Clause claims is because the Takings Clause is chronically honored in the breach whereas the Equal Protection Clause is enforced with appropriate vigor. The Takings Clause is treated as a poor relation. This Court should grant certiorari to put an end to this practice.

c. Good Public Policy Demands That All Facially Unconstitutional Laws Be Stricken

Petitioner respectfully submits that it is simply bad public policy to permit any facially unconstitutional law to remain on the statute books. When the public observes that a facially unconstitutional law is on the books and being enforced, and that relief is barred by a "technical" defense such as the statute of limitation, the public's respect for the courts and for the constitution itself is inevitably undermined.

II. The San Francisco Residential Hotel Ordinance is Indeed Unconstitutional

While the Ninth Circuit would deem the question moot, the fact remains that the San Francisco Residential Hotel Ordinance, which is vigorously enforced on an ongoing basis, is indeed facially unconstitutional. As the federal district court opined: "the Ordinance illogically places the blame for the social ill of homelessness on the shoulders of residential hotel owners; it singles out a few to bear the costs which should be borne by the many – a constitutionally impermissible governmental act." "Plaintiffs, hotel owners, voluntarily provided some low-income housing by operating their properties on a residential basis for a period of time. Rather than commending the hotel owners for their efforts to help low income individuals, defendant San Francisco enacted the Residential Hotel Ordinance, effectively placing plaintiffs into perpetual servitude by forcing them to remain in the residential rental business and preventing them for changing businesses. Such an ordinance is impermissible under the constitution."

The district court reasoned correctly that by shifting onto a small group of property owners the cost of treating social problems which should be borne by the taxpaying public as a whole, the City violated constitutional principles enunciated by this Court in *Armstrong v. United States,* 384 U.S. 40 (1959), and recently reiterated by this Court in *Yee v. City of Escondido,* 112 S.Ct. 1522 (1992). As this Court stated in *Yee, supra,* 112 S.Ct at 1526: a regulatory taking occurs where "the purpose of the regulation . . . suggests that the regulation has singled out the

property owner to bear a burden which should be borne by the public as a whole."

While the California state courts have steadfastly refused to afford property owners any relief from the Residential Hotel Ordinance, they have implicitly recognized that it violates the federal constitution. For example, in *Terminal Plaza Corp. v. City and County of San Francisco*, 177 Cal.App.3d 892, 912 (1986), the California Court of Appeals professed itself "concerned that the Ordinance places a disproportionate share of the burden of providing low cost housing upon residential hotel property owners, rather than fairly dispersing the cost of conferring such a social benefit upon society as a whole." This clearly rendered the Ordinance unconstitutional under the test enunciated by this Court in *Armstrong v. United States*, 364 U.S. 40, 49 (1959) (unconstitutional taking effected where government "force[s] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Accord, *Yee, supra*) In *Bullock v. City and County of San Francisco*, 221 Cal.App.3d 1072, 1089 (1990), the California Court of Appeal blithely abdicated its responsibility for constitutional review, concluding its cursory analysis with the remark: "If a change is to be made, it must come from a higher court."

One higher court which did trouble to reach the merits of a residential hotel ordinance virtually identical to the San Francisco Residential Hotel Ordinance here at issue is New York state's highest court, the New York Court of Appeals. That court's well reasoned opinion in *Seawall Associates v. City of New York*, 542 N.E.2d 1059 (1989), *cert. den.*, 107 L.Ed.2d 503 (1989), applied principles enunciated by this Court in *Nollan v. California*

Coastal Commission, 92 L.Ed.2d 677, to strike down New York City's residential hotel ordinance. The New York Court's analysis can scarcely be improved upon, and merits quotation.

The New York Court of Appeals commenced its analysis by observing that the key question "in any case where government action is challenged as violative of the right of just compensation, is whether the uncompensated obligations and restrictions imposed by the governmental action, force individual property owners to bear more than a just share of obligations which are rightfully those of society at large." (*Seawall, supra*, 542 N.E.2d at 1062)

In holding that New York City's residential hotel ordinance did effect an unconstitutional taking of hotel owners' property, the New York Court of Appeals focused on several distinct factors. Firstly, the owners were required to devote their property to a public purpose:

> Owners are forced to devote their properties to a . . . use which, albeit one which might serve the City's interests, bears no relation to any economic purpose which could reasonably be contemplated by a private investor. . . .
>
> * * *
>
> [T]he City, by affirmatively requiring the owners to put their properties to public use, is acting in its enterprise capacity, where it takes unto itself private resources in use for the common good.

(*Seawall, supra*, 542 N.E.2d at 1066, 1070)

Secondly, to the extent that the New York City ordinance required certain persons to operate their properties

as residential hotels, it interfered with the owners' right to develop or sell their properties. (*Seawall, supra,* 542 N.E.2d at 1066-67, citing *Hodel v. Irving,* 481 U.S. 704 (1987))

Thirdly, New York City failed to satisfy the "close nexus" requirement imposed by this Court in *Nollan*:

> [Under *Nollan,*] the heavy exactions imposed by [the New York City residential hotel ordinance] must "substantially advance" its putative purpose of relieving homelessness. No such showing of this required "close nexus" has been made. Rather, the nexus between the obligations placed on [residential hotel] property owners and the alleviation of the highly complex social problem of homelessness is indirect at best and conjectural. Such a tenuous connection between means and ends cannot justify singling out this group of property owners to bear the costs required by the law toward the cure of the homeless problem. Indeed, by equating the "cure" with dollars – i.e. permitting "buy-out" payments of $45,000 per [residential hotel] unit in lieu of keeping the units available for rent . . . – the terms of the Law itself demonstrate that the obligations placed on a few property owners are just the kind which could, and should, be borne by the taxpaying public as a whole.

(*Seawall, supra,* 542 N.E.2d at 1069)

The New York Court of Appeals was not impressed by the City's contentions that the Ordinance's buy-out, replacement and hardship provisions rendered the law constitutional:

> [T]he City, in the buy-out and replacement exemption is saying no more to the owners than that it will not do something unconstitutional if they pay the City not to do it. But if the initial act amounts to an unlawful taking, then permitting the owners to avoid the illegal confiscation by paying a "ransom" cannot make it lawful. Indeed, the stark alternative offered by [this] Law – either submit to an uncompensated and, therefore, unconstitutional appropriation of your properties or pay the price (in cash or replacement units) – amounts to just the sort of exaction which could be classified, not as a valid regulation of land use but, "an out-and-out plan of extortion." (*J.E.D. Associates, Inc. v. Atkinson*, 121 N.H. 581, 584, 432 A.2d 12, 14-15 (1981)) (*Nollan v. California Coastal Comm., supra*, 483 U.S. at 837, 107 S.Ct. at 3148; see also, Sterk, *Nollan, Henry George and Exactions*, 88 Colum. L.Rev. 1731, 1746-51.)

(*Seawall, supra*, 542 N.E.2d at 1069-1070. Footnote omitted.)

The *Seawall* Court was eloquent in conclusion:

> [The challenged ordinance] force[s] property owners alone to bear public burdens which in all fairness and justice should be borne by the public as a whole." (*Armstrong v. United States, supra*, at 49) Because the owners are, by the terms of the law, afforded no compensation, [the ordinance], we hold, is facially invalid, under the "takings" clauses of both the federal and state constitutions.
>
> * * *
>
> No one disputes that the City has the power to prohibit the demolition of [residential hotel]

> properties, or direct restoration of [residential hotel] units to habitable condition to be leased at modest rents for indefinite periods. The City clearly has that power. The question is who is to pay for this, and more particularly, whether the City – in accordance with Constitutional mandate – must compensate property owners before it can "place [them] in business, force them to remain in that business and refuse to allow them to ever cease doing [that] business." [citation] The issue is not one of "economic due process", but constitutional command.
>
> No one minimizes the tragic reality of homelessness. But the City's response – to foist its responsibility on certain private property owners, by requiring them to remain in the [residential hotel] business or ransom their property rights – simply does not meet the requirements of the federal and state constitutions.

(*Seawall, supra,* 542 N.E.2d at 1070-71)

Every statement above which the New York Court of Appeals made concerning the unconstitutionality of New York City's residential hotel ordinance applies with equal force to San Francisco's residential hotel ordinance. The critical fact about both the San Francisco Ordinance and its New York City counterpart is that they are not zoning type regulations designed to promote harmonious land use or prevent nuisances. Rather, they are laws frankly designed to appropriate private property for a public purpose; an objective which may only be accomplished under our constitution through the exercise of eminent domain and payment of just compensation.

Stated another way, if government wishes to acquire property to place in public service, it may do so only

through the exercise of its power to tax and spend. Regrettably, San Francisco's Residential Hotel Ordinance substitutes the uncompensated regulatory dedication of private property to public use, for the proper exercise of the power to tax and spend. This is vividly illustrated by section 41.3(m) of the Ordinance, which explicitly states that the in lieu fee is being escalated from forty percent of construction costs plus site acquisition costs, to eighty percent of construction costs plus site acquisition costs, due to unexpected shortfalls in federal, state and local funding. Thus, the Ordinance, on its face, actually acknowledges that the residential hotel units, or their in lieu payment equivalent, are used as a substitute for tax revenues.

In summary, the City of San Francisco has pressed private property into public use rather than taxing and spending as necessary to acquire any needed property.[5] This approach is nothing if not politically expedient, because it shifts the cost of dealing with a social problem off the backs of the taxpaying – and voting – public as a whole, and onto the backs of a handful of politically powerless small landowners. Yet this is *precisely* the evil which the Takings Clause was originally intended to remedy.

As this Court opined nearly three quarters of a century ago in *Pennsylvania Coal Company v. Mahone*:

> The protection of private property in the Fifth Amendment presupposes that it is wanted for

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[5] Whether any property is indeed needed, is itself debatable. For the past three years, average annual vacancy rates in San Francisco residential hotels have exceeded twenty-five percent.

> public use, but provides that shall not be taken for such use without just compensation . . . When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until private property disappears. But that cannot be accomplished in this way under the Constitution of the United States . . . In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders. [Citation omitted] We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut that the constitutional way of paying for the change.

(*Pennsylvania Coal Company v. Mahone*, 260 U.S. 393, 415, 416 (1922))

In the years which have passed since this Court decided *Pennsylvania Coal*, the increasingly broad discretion local governments have been allowed in regulating land use pursuant to their police power, has intensified the all too human temptation to place private property in uncompensated public service under the guise of regulating land use. The numerous procedural barriers which state and federal courts have erected in Fifth Amendment Takings cases have served to further reassure local governments that the courts will always turn a blind eye to their true unconstitutional motives, and that they will never be required to pay for property which they have taken. The net effect is that the Takings Clause of the Fifth Amendment to the United States Constitution is

routinely honored in the breach. It has truly become a poor relation to the other guarantees of our Bill of Rights.

This Court should grant certiorari to hold that the Takings Clause is not a dead letter, and that local governments may not, under the guise of land use regulation, substitute the uncompensated appropriation of private property for the constitutionally authorized exercise of the power to tax and spend.

CONCLUSION

For the aforestated reasons, this Court should grant a writ of certiorari to review the decision of the United States Court of Appeal for the Ninth Circuit, affirming dismissal of the Golden Gate Hotel Association's facial constitutional challenge to San Francisco's Residential Hotel Ordinance.

Respectfully submitted,

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22 April 1996

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NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GOLDEN GATE HOTEL ASSOCIATION, Plaintiff-Appellant, v. CITY AND COUNTY OF SAN FRANCISCO; TENDERLOIN HOUSING CLINIC, INC., RANDALL M. SHAW; BRADFORD PAUL; NORTH OF MARKET PLANNING COALITION, Defendants-Appellees.	No. 94-16445 D.C. No. CV-91-03386-DLJ MEMORANDUM* (Filed Jan. 23, 1996)

Appeal from the United States District Court
for the Northern District of California
D. Lowell Jensen, District Judge, Presiding
Argued Submission Deferred November 14, 1995
Resubmitted November 27, 1995
San Francisco, California

Before: SCHROEDER and ALARCON, Circuit Judges, and PANNER,* District Court Judge.

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

*Honorable Owen M. Panner, Senior United States District Judge for the District of Oregon, sitting by designation.

Plaintiff-Appellant Golden Gate Hotel Association ("GGHA") appeals the district court's dismissal, on statute of limitations grounds, of its 42 U.S.C. § 1983 facial challenge to the constitutionality of San Francisco's Residential Hotel Unit Conversion and Demolition Ordinance ("Ordinance"). San Francisco Admin. Code §§ 41.1-41.22. This is the second time the case has been before this court. In the earlier appeal, we reversed the injunction that the district court granted upon holding the Ordinance unconstitutional, and remanded for a determination of whether GGHA's claim was time barred. *Golden Gate Hotel Association v. San Francisco*, 18 F.3d 1482 (9th Cir. 1994).

In our earlier opinion, we noted that under this circuit's law, the limitations period for a § 1983 takings claim that originates in California is one year. *Id.* at 1486 *citing Azul-Pacific, Inc. v. City of Los Angeles*, 973 F.2d 704, 705 (9th Cir. 1992), *cert. denied*, 113 S.Ct. 1049. The limitations period, however, will ordinarily not begin to run until the claimant has sought and been denied just compensation in state court. *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194-95 (1985). But, if action in state court would be futile, the statute of limitations begins to run from the date the offending ordinance is enacted. *Levald, Inc. v. City of Desert Palm*, 998 F.2d 680, 687 (9th Cir. 1983).

Our earlier opinion also noted that Golden Gate did not file its complaint until September, 1991, a decade after the Ordinance was originally enacted in 1979. 18 F.3d at 1487. Because California provided no method for gaining monetary compensation for alleged regulatory takings prior to the Supreme Court's 1987 decision in *First English*

Evangelical Lutheran Church of Glendale v. Los Angeles County, 482 U.S. 304 (1987), GGHA had no state law remedies to exhaust in 1979. GGHA's challenge to the 1979 ordinance was ripe as of the time of enactment. Its challenge to that ordinance is thus, under the law of our circuit, barred by the one-year statute of limitations.

While the plaintiff attempts to assert that its § 1983 claim cannot be time barred because it is one for injunctive relief rather than damages, we have held that the statute of limitations for all § 1983 claims originating in California, including claims for equitable relief, is one year. *See Levald*, 998 F.2d 680, 688 (9th Cir. 1993). Thus, recasting a complaint to seek declaratory or injunctive relief will not circumvent the statute of limitations. *Id.*

Finally, in 1990, San Francisco repealed the 1979 Ordinance and reenacted it in a modified form. Although a sufficient modification might give GGHA a new cause of action, GGHA does not argue on appeal that the 1990 reenactment effected a taking in a manner distinguishable from the 1979 version. *See DeAnza Properties, Ltd. v. County of Santa Cruz*, 936 F.2d 1084, 1086 (9th Cir. 1991) (renacted statute did not reset statute of limitations where "[a]ppellants were experiencing substantially the same injury" under both versions). Thus, the issue is not properly before this court. *Wilcox v. Commissioner*, 848 F.2d 1007, 1008 n.2 (9th Cir. 1988).

AFFIRMED.

GOLDEN GATE HOTEL ASSOCIATION, Plaintiff, v. CITY AND COUNTY OF SAN FRANCISCO; TENDERLOIN HOUSING CLINIC, INC., RANDALL M. SHAW, and BRADFORD PAUL Defendants.	C-91-3386-DLJ ORDER (Filed Aug. 2, 1994)

On July 20, 1994, this Court heard defendants' motion for summary judgment on the issue of statute of limitations. Appearing for plaintiff was Violet Elizabeth Grayson of Grayson & Topsfield, appearing for defendant City and County of San Francisco and defendant Brad Paul was Andrew W. Schwartz, Bruce Goldstein of Farella, Braun & Martel appeared for defendant the North of Market Planning Coalition, and Randall Shaw appeared for the Tenderloin Housing Clinic.

I. Procedural Background

The Ninth Circuit has concluded that the district court, Judge Vukasin presiding, erred when it struck defendants' motion for summary judgment because it came after the original motion papers were filed and a hearing held. *Golden Gate Hotel Ass'n v. San Francisco*, 18 F.3d 1482, 1487, (9th Cir. 1994). In reaching its decision to remand, the Ninth Circuit noted that the case of *Azul-Pacifico, Inc. v. City of Los Angeles*, 973 F.2d 704 (9th Cir.

1992), *cert. denied*, 113 S.Ct. 1049 (1993) ("Azul II"), "established that the limitations period for any takings claim in California was one year, not five or six, from the date the offending ordinance was enacted." 18 F.3d 1482, 1487 (9th Cir. 1994). The Ninth Circuit observed further that plaintiffs here did not apparently comply with the limitations requirements as set forth in *Azul II*. The Court stated that "Golden Gate did not file its complaint until September 1991, a decade after the Ordinance was originally enacted in 1979, and over one year after its most recent enactment in May 1990." *Id.*

Although the Ninth Circuit chose to remand the matter, it noted that "[i]n view of our discussion on the applicable statute of limitations for Section 1983 actions brought in California, the result may be truly foreordained. However, in an abundance of caution, we leave that decision to the district court in the first instance." *Id.* Accordingly, the Court here considers the application of a time-bar to Golden Gate's complaint.

II. Plaintiff's Facial Taking Claim

The statute of limitations for a facial taking claim begins when the ordinance is enacted. *De Anza Properties X, Ltd. v. County of Santa Cruz*, 936 F.2d 1084, 1085 (9th Cir. 1991); *Azul II*, 973 F.2d at 705; *Levald v. Palm Desert*, 998 F.2d 680 (9th Cir. 1993). In this case, the first cause of action asserts that the Residential Hotel Ordinance ["Ordinance"] adopted by the City and County of San Francisco is "facially violative of the Fifth Amendment to the United States Constitution" and seeks declaratory relief. Complaint at 5.

As the Ninth Circuit noted in *Golden Gate, supra,* the Hotel Conversion Ordinance was first enacted in 1979. Golden Gate filed its complaint on September 30, 1991, a decade after the law was first passed and more than a year since the relevant laws were again enacted. Accordingly, plaintiff's complaint is barred.[1]

Plaintiff offers two arguments against the imposition of a time-bar. First, plaintiff asserts that the Ordinance inflicts an on-going, daily violation of hotel owners, constitutional rights, and so plaintiff is entitled to some remedy. *See* Plaintiff's Supplemental Memorandum at 4. Plaintiff notes cases in which the United States Supreme Court has struck down "facially unconstitutional laws . . . without regard to their date of enforcement." *Id.*

Plaintiff's analysis conflicts with decisions of the Ninth Circuit. The Ninth Circuit has commented that in as-applied challenges the harm inflicted by a statute is continuing, or does not occur until the statute is enforced. However, the Ninth Circuit has specifically held that "[i]n the takings context, the basis of a facial challenge is that the very enactment of the statute has reduced the value of the property or has effected a transfer of property interest." *Levald,* 998 F.2d at 688.

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[1] In this district, Judge Orrick has also found that a facial challenge to the Ordinance was barred by the one-year statute of limitations. Unpublished Memorandum Decision in *Kardosh v. San Francisco,* Case No. C94-0435-WHO at 7 (July 1, 1994) (holding plaintiff's "facial challenges are barred by the one year statute of limitations that applies to § 1983 actions and must be dismissed.").

Plaintiff's second argument is that this Court should ignore the statute of limitations for plaintiff's § 1983 claim. This proposition is not supported by the clear, but not fully explained, language of the Ninth Circuit in *Azul II*. That court held that "[p]laintiff has no cause of action directly under the United States Constitution. We have previously held that a litigant complaining of a violation of a constitutional right must utilize 42 U.S.C. § 1983." 973 F.2d at 705 (citations omitted). Plaintiff's argument is simply not consistent with the law of the circuit. As clearly outlined in the Ninth circuit's decision in *Golden Gate Hotel Ass'n v. San Francisco*, it has been "established that the limitations period for any takings claim in California was one year, not five or six, from the date the offending ordinance was enacted." 18 F.3d at 1487. Accordingly, plaintiff's arguments are unavailing.

B. Plaintiff's Other Causes of Action

Plaintiff concedes at hearing that as the complaint is pled, all causes of action are dependant on the first cause of action, the facial challenge. As summary judgment must be granted on this cause of action, judgment on the entire complaint must be granted as well.

III. CONCLUSION

For the foregoing reasons, the Court GRANTS defendants' motion for summary judgment.

IT IS SO ORDERED

Dated: August 2, 1994

/s/ D. Lowell Jensen
D. Lowell Jensen
United States District Judge

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GOLDEN GATE HOTEL ASSOCIATION, *Plaintiff-Appellee,* v. CITY AND COUNTY OF SAN FRANCISCO and BRAD PAUL, *Defendants-Appellants.*	No. 93-16713

GOLDEN GATE HOTEL ASSOCIATION, *Plaintiff-Appellee,* v. CITY AND COUNTY OF SAN FRANCISCO and BRAD PAUL, *Defendants,* and TENDERLOIN HOUSING CLINIC, INC., *Defendant-Appellant.*	No. 93-16714

GOLDEN GATE HOTEL ASSOCIATION,

Plaintiff-Appellee,

v.

CITY AND COUNTY OF SAN FRANCISCO and BRAD PAUL,

Defendants,

and

NORTH OF MARKET PLANNING COALITION,

Defendant-Appellant.

No. 93-16784

D.C. No. CV-91-03386-JPV

OPINION

Appeal from the United States District Court
for the Northern District of California
John P. Vukasin, Jr., District Judge, Presiding

Argued and Submitted
January 10, 1994 – San Francisco, California

Filed March 18, 1994

Before: Ruggero J. Aldisert*, Charles Wiggins, and Melvin Brunetti, Circuit Judges.

Opinion by Judge Aldisert

* Ruggero J. Aldisert, Senior Judge, United States Court of Appeals for the Third Circuit, sitting by designation.

COUNSEL

Andrew W. Schwartz and George K.H. Schell, Deputy City Attorneys, San Francisco, California, for the defendant-appellant; Timothy J. Lee, Tenderloin Housing Clinic, San Francisco, California, for the defendant-appellant; Tamar Pachter, Farella, Braun & Martel, San Francisco, California, for defendant-appellant.

Violet Elizabeth Grayson, Grayson & Topsfield, San Francisco, California, for the plaintiff-appellee.

John Blankenship, Montgomery, Purdue Blankenship & Austin, Seattle, Washington; Paul D. Kamernar, Washington Legal Foundation, Washington, DC, for the amicus; R.S. Radford, Pacific Legal Foundation, Sacramento, California, for the amicus; Andrew M. Zacks, San Francisco, California, for the amicus; Paul F. Utrecht, Oakland, California, for the amicus.

OPINION

ALDISERT, Senior Circuit Judge:

The City and County of San Francisco, the Tenderloin Housing Clinic, Inc. and the North of Market Planning Coalition (collectively "Appellants") appeal the district court's declaration that the City's residential hotel conversion ordinance violates the Fifth Amendment's proscription against taking private property without just compensation. After granting partial summary judgment in favor of the Golden Gate Hotel Association, an organization of residential hotel owners and operators, the

court permanently enjoined the City from enforcing the regulation.

Before we may meet the merits of the constitutional law issues, we must decide whether the court abused its discretion in refusing to consider the statute of limitations issue presented to it by Appellants in the summary judgment proceedings.

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1334. The action became appealable on September 9, 1993, when the district court granted partial judgment in favor of Golden Gate and ordered a permanent injunction against Appellants, effectuating a previous order entered June 21, 1993. An order granting a permanent injunction is a final order. *See Mayor & Aldermen of Vicksburg v. Henson*, 231 U.S. 259, 267 (1913). Accordingly, we have jurisdiction under 28 U.S.C. § 1291. The appeal was timely filed under Rule 4(a) of the Federal Rules of Appellate Procedure.

I.

In 1979, the City and County of San Francisco enacted ordinances designed to combat the growing shortage of affordable residential housing. One such ordinance was the Residential Hotel Unit Conversion and Demolition Ordinance. San Francisco Admin. Code §§ 41.1-41.22. By its terms, owners of so-called residential hotels, hotels with guests who regularly stay in excess of 30 days, may discontinue long-term rentals and convert to "tourist hotels" only by providing relocation assistance to its residents and by replacing the residential hotel units being converted. Hotel owners may accomplish this

by (1) constructing replacement units, (2) rehabilitating other residential hotel units, (3) constructing or rehabilitating transitional emergency housing or (4) contributing an "in lieu" fee to the City's preservation fund or a nonprofit housing group in the amount of 80 percent of the construction cost of the number of units converted, plus site acquisition costs. E.R., ex. 64, at 12; San Francisco Admin. Code § 41.13. The Ordinance was reenacted in substantially the same form in January 1981 and again, in a slightly modified form, in May 1990.

Since the Ordinance was first enacted in 1979, local residential hotel owners have raised at least two Fifth Amendment challenges in California state courts. In both instances, the California Court of Appeal held that the Ordinance did not effect a taking of property without just compensation in violation of the Fifth Amendment. *See Terminal Plaza Corp. v. City & County of San Francisco,* 177 Cal.App.3d 892 (1986); *Bullock v. City & County of San Francisco,* 221 Cal.App.3d 1072 (1990).

In June 1991, local residential hotel owner Adam Sparks, who had been enjoined in state court from violating the Ordinance, filed a petition for writ of habeas corpus in the Northern District of California, seeking relief from the injunction and contempt citations previously issued against him. Brief for Appellants at 5-6. Although it denied the petition, the district court voiced its firm conviction that the Ordinance was unconstitutional and its hope that the Ordinance soon would be invalidated. *Id.* Shortly thereafter, Sparks' attorney filed the instant lawsuit on behalf of Golden Gate to declare the Ordinance unconstitutional. *Id.* Appellants timely

filed separate answers, each of which raised the statute of limitations as an affirmative defense.

On November 20, 1991 Golden Gate filed a motion for summary judgment asking the court to declare the Ordinance unconstitutional on its face. The court set the motion hearing for April 23, 1992. On March 24, Appellants filed a cross-motion for summary judgment asserting that Golden Gate's claims were not ripe for federal review because it did not first seek relief in state court. The district court heard oral argument on both motions on April 23, 1992 and took them under submission.

On September 16, 1992, Appellants jointly filed a second motion for summary judgment, claiming that the applicable statute of limitations barred Golden Gate's claims. They had not asserted this defense in their first motion and contend that they raised the issue in the subsequent summary judgment motion because the law in this judicial circuit had recently changed. Appellants state in their brief that they brought to the court's attention the vacating of our decision in *Azul Pacifico, Inc. v. City of Los Angeles*, 948 F.2d 575 (9th Cir. 1991) (*Azul I*) and its replacement by *Azul-Pacifico, Inc. v. City of Los Angeles*, 973 F.2d 704 (9th Cir. 1992), *cert. denied*, 113 S.Ct. 1049 (1993) (*Azul II*). On October 29, 1992, the district court took Appellants' second motion under submission without oral argument.

On June 21, 1993, eight months after taking the second motion under submission, the court declared the case ripe for adjudication and granted Golden Gate's motion

to strike Appellants' second motion for summary judgment on the ground that to entertain the statute of limitations defense would not be "fair" because Golden Gate had submitted its motion on the merits on April 23, 1992. E.R., Ex. 64, at 8. The court then granted Golden Gate's motion for summary judgment and denied Appellants' cross-motion.

The court held that the Ordinance was unconstitutional on its face both as a physical occupation and as a regulatory taking. In the words of the district court, the Ordinance "illogically place[d] the blame for the social ill of homelessness on the shoulders of residential hotel owners; it singles out a few to bear the costs which should be borne by the many – a constitutionally impermissible governmental act." *Id.* at 23.

A recapitulation of the summary judgment timetable is important when considering the Appellants' timeliness in presenting the limitations issue:

November 20, 1991	Golden Gate moves for summary judgment. Court sets motion hearing for April 23, 1992.
March 14, 1992	Appellants file cross-motion for summary judgment.
April 23, 1992	Court hears oral argument on both motions and takes them under submission.
July 23, 1992	This court decides Azul II, holding that for causes of action brought directly under the Takings Clause, the limitations period for Section 1983 actions applies.

September 16, 1992	Appellants file a second pretrial motion for summary judgment, raising the limitations issue addressed in Azul II.
October 29, 1992	Court takes Appellants' second motion under submission without oral argument.
June 21, 1993	Court decides summary judgment motions and grants Golden Gate's motion to strike Appellants' statute of limitations defense which had been presented eight months before it ruled on the motions.

We review a district court's decision to grant a motion to strike unscheduled supplementary material for abuse of discretion. *Admiralty Fund v. Hugh Johnson & Co.*, 677 F.2d 1301, 1314 (9th Cir. 1982); *see also Carpenter v. Universal Star Shipping, S.A.*, 924 F.2d 1539, 1547 (9th Cir. 1991), *cert. denied*, 113 S.Ct. 413 (1992) (court's refusal to entertain untimely material in support of a motion for summary judgment reviewed for abuse of discretion). Discretion is abused when the judicial action is "arbitrary, fanciful or unreasonable" or "where no reasonable man [or woman] would take the view adopted by the trial court." *Delno v. Market St. Ry. Co.*, 124 F.2d 965, 967 (9th Cir. 1942).

In granting Golden Gate's motion to strike, the district court stated:

> It would be inappropriate for the court to consider further, unrequested briefing on a motion already briefed, argued, and submitted. In the same vein, then, it would be improper for the

> court, having taken one motion under submission, to consider a new motion that went to the merits of the submitted motion. At bottom here is a sense of fairness; a party should not be given a chance to rebrief one motion by filing a second motion. Defendants' second motion for summary judgment is nakedly an attempt to get another bite of the apple. This court only gives one bite.

E.R., Ex. 64, at 8. This was the extent of the court's discussion when it granted Golden Gate's motion to strike Appellants' second motion for summary judgment. It bears repetition that each Appellant raised the statute of limitations as an affirmative defense in separate answers to Golden Gate's complaint, placing all parties and the court on notice that the statute of limitations would be an issue.

II.

We must now consider the district court's action in striking Appellants' second motion for summary judgment on the ground that they should have asserted the limitations issue in their original motion. To understand Appellants' response that the law of limitations relating to these proceedings was in a state of flux prior to our decision in *Azul II*, it is necessary to review how the law developed here and in the Supreme Court from the time the Ordinance was enacted and re-enacted.

Prior to April 1985, the limitations period for a civil rights action in California brought under 42 U.S.C. § 1983 was three years from the time the cause of action accrued. *See Smith v. Cremins*, 308 F.2d 187, 190 (9th Cir. 1962). We

noted in *Cremins* that because Section 1983 contains no provision limiting the time within which an action may be brought, the relevant state statute of limitations governed and that the applicable state limitations period in California was three years. *Id.* at 189. Subsequently, the Supreme Court decided *Wilson v. Garcia*, 471 U.S. 261 (1985), in which it held that Section 1983 claims are best characterized as personal injury actions and that the relevant limitations period is the state personal injury statute of limitations. Consequently, subsequent to 1985, the limitations period for Section 1983 actions in California was reduced from three years to one. *See De Anza Properties X, Ltd. v. County of Santa Cruz*, 936 F.2d 1084, 1085 (9th Cir. 1991). For cases arising at the time of or near the *Wilson* decision, we determined that the applicable statute of limitations for Section 1983 actions was "either three years from the time the cause of action arises or one year from *Wilson*, depending on which period expires first." *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). In *De Anza*, 936 F.2d at 1086-87, we held that the limitations period accrues when a party knows or has reason to know of the injury, and that when the injury was occasioned by the enactment of an ordinance, the injury takes place upon its enactment.

Golden Gate filed its complaint on September 30, 1991, when *De Anza* was the controlling law of this circuit. Tenderloin Housing Clinic filed its answer on October 18, 1991, Brad Paul on October 22, 1991, and the North of Market Planning Coalition on November 10, 1991. Appellants suggest that they were relying on *De Anza* when they filed their answers which raised the limitations defense: They assumed that Golden Gate's

cause of action accrued upon enactment of the Ordinance and that the statute of limitations was one year.

However, on November 1, 1991, we muddied the waters with our decision in *Azul I*, 948 F.2d at 587, wherein we stated: "Although the Constitution gives [a litigant asserting a claim of unjust taking] a right of action, it does not provide a statute of limitations. In such situations, federal courts generally adopt the analogous state statute of limitations." Courts will not adopt the state limitations period, however, if to do so would contravene governing federal policy. *Id.* We further noted that the California limitations period for inverse condemnation proceedings was five years and that the limitations period for the most analogous federal statute, the Tucker Act, was six years. Although we declined to consider whether the state or federal limitations period should apply to takings cases brought directly under the Fifth Amendment, we stated that the statute of limitations in such actions was at least five, and possibly six, years. *Id.*

When Appellants filed their cross-motion for summary judgment in March 1992, our decision in *Azul I* governed the appropriate statute of limitations. Because Golden Gate did not invoke Section 1983 in its first cause of action but simply charged that the Ordinance "is facially violative of the Fifth Amendment to the United States Constitution," E.R., Ex. 1, at 5, Appellants argue that it was reasonable for them to believe that the cause of action was brought directly under the Constitution and that, based on our discussion in *Azul I*, the applicable statute of limitations was not the one year limitations period governing Section 1983 actions, but rather five or six years.

However, by the time Appellants filed their second summary judgment motion in September 1992, *Azul I* was no longer the law of this circuit. The holding in that case had been supplanted by *Azul II*, which established that all claims of unjust taking had to be brought pursuant to Section 1983 and, therefore, the one year statute of limitations applied. 973 F.2d at 705. Appellants argue here, as they did in the district court, that subsequent to our holding in *Azul II*, the statute of limitations again became a viable defense. Consequently, they filed a second summary judgment motion raising the limitations defense less than two months after *Azul I* was withdrawn and replaced by *Azul II*.

III.

Because of the developing law in this circuit during the period of the summary judgment proceedings in the district court, we must look to the status of the law when Appellants filed their answers, when they filed their first motion for summary judgment, when the court heard oral argument of the cross-motions and when Appellants filed their second motion for summary judgment. This is important when considering the district court's action in striking Appellants' second motion on the ground that it was "nakedly an attempt to get another bite of the apple. This court gives only one bite." E.R., Ex. 64, at 8.

We agree with Appellants that when the complaint and the first summary judgment motions were filed and argument heard, the relevant law on limitations for unconstitutional takings was set forth in two potentially conflicting cases, *De Anza*, 936 F.2d at 1084, and *Azul I*,

948 F.2d at 574. However, the conflict was resolved on July 23, 1992 when the *Azul II* panel withdrew its opinion in *Azul I* and made clear that in takings cases: "Plaintiff has no cause of action directly under the United States Constitution. We have previously held that a litigant complaining of a violation of a constitutional right must utilize 42 U.S.C. § 1983." 973 F.2d at 705. *Azul II* further established that the limitations period for any takings claim in California was one year, not five or six, from the date the offending ordinance was enacted. *Id.*

Golden Gate did not file its complaint until September 1991, a decade after the Ordinance was originally enacted in 1979, and over one year after its most recent reenactment in May 1990. Given the churning of the law regarding the limitations period for takings claims in this circuit, we can not say that Appellants slept on their rights by not asserting a statute of limitations defense in their first motion for summary judgment. We conclude that it was not until our decision in *Azul II* that Appellants received arguable legal support to make such a contention in the summary judgment proceedings. To bring this to the court's attention on September 16, 1992 was not dilatory on their part, especially in light of the record that the court did not rule on the summary judgment motions until nine months later, on June 21, 1993. We conclude, therefore, that the district court erred in striking Appellants' September 1992 motion for summary judgment as being violative of a "sense of fairness." E.R., Ex. 64, at 8.

Having so concluded, we must now decide whether to go one step further and decide the limitations issue on the merits.

IV.

At oral argument both parties urged us to decide whether Golden Gate's complaint should be dismissed as being time-barred, arguing that this court can decide the issue on the basis of the record before us. The district court did not consider the merits of the limitations argument. On the contrary, it granted Golden Gate's motion to strike Appellants' second motion for summary judgment which raised the limitations issue.

As a general rule, "a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). This is not a hard and fast rule:

> The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases. . . . Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt, *see Turner v. City of Memphis*, 369 U.S. 350 (1962), or where "injustice might otherwise result." *Hormel v. Helvering*, 312 U.S. [552] at 557.

Id. at 121 (footnote omitted).

We choose not to exercise our discretion to consider the merits of the limitations defense in this case. Instead, we will apply the general rule and require the district court to decide this issue in the first instance. Although the parties at oral argument expressed a willingness for us to decide this issue, the fact that Golden Gate joined in this request was an indication that, at least in its mind,

the "proper resolution is [not] beyond any doubt." Moreover, the issue was not briefed before us on the merits. Rather, it was raised solely in the context of whether this defense was timely presented in the summary judgment proceedings: Specifically, Appellants asked us to decide whether the district court properly struck their second motion for summary judgment which raised the issue. In view of our discussion on the applicable statute of limitations for Section 1983 actions brought in California, the result may be truly foreordained. However, in an abundance of caution, we leave that decision to the district court in the first instance.

The judgment of the district court is VACATED and the order striking Appellants' second motion for summary judgment is REVERSED and the proceedings REMANDED for consideration in the first instance of whether Golden Gate's complaint was time-barred.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

GOLDEN GATE HOTEL ASSOCIATION, Plaintiff, v. CITY AND COUNTY OF SAN FRANCISCO, TENDERLOIN HOUSING CLINIC, INC., NORTH OF MARKET PLANNING COALITION, and BRAD PAUL, Defendants.	No. C-91-3386-JPV ORDER ON DEFENDANTS' MOTIONS TO RECONSIDER AND CERTIFY FOR APPEAL ORDER OF JUNE 21, 1993 AND PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER; ORDER ENTERING PERMANENT INJUNCTION AND MODIFYING COURT'S JUNE 21, 1993 ORDER (Filed Sep. 9, 1993)

INTRODUCTION

Plaintiff, Golden Gate Hotel Association, brought a motion for temporary restraining order. Defendants City and County of San Francisco and Brad Paul (collectively "City"), North of Market Planning Coalition ("North of Market"), and Tenderloin Housing Clinic, Inc. ("Tenderloin") brought motions to reconsider and to certify for interlocutory appeal the court's June 21, 1993 order granting plaintiff's motion for summary judgment on its first cause of action. The court scheduled the motions for hearing on August 12, 1993. After a review of the briefs, the court submitted the motions without oral argument

pursuant to Local Rule 220-1 and now herein rules on those motions.

BACKGROUND

Plaintiff brought suit seeking, *inter alia*, a declaration that the City's Hotel Conversion Ordinance ("Ordinance")[1] violates the fifth amendment's proscription of taking private property without just compensation. By order dated June 21, 1993, the court granted plaintiff's motion for summary judgment on its first of eleven causes of action, declaring the Ordinance unconstitutional on its face.

Defendants filed motions for reconsideration and certification for interlocutory appeal of the court's June 21 order. Before defendants' motions were to be heard, plaintiff filed a motion for a temporary restraining order, seeking to enjoin the City from continuing to enforce the Ordinance. The court coordinated the briefing and consolidated the hearing of defendants' and plaintiff's motions. Those motions are the subject of this Order.

DISCUSSION

I. Defendants' Motions

Defendants move for the court to reconsider its order of June 21 or to certify it for interlocutory appeal and stay effect of the order pending appeal. Defendants allege that the court's order erred concerning the following issues:

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[1] San Francisco Administrative Code §§ 31, *et seq.*

(1) the ripeness of plaintiff's facial challenge of the Ordinance;

(2) the timeliness of defendants' second motion for summary judgment, which was based on the alleged untimeliness with respect to the statute of limitations of plaintiff's facial challenge of the Ordinance;

(3) the constitutionality of the Ordinance.

The court does not find that it erred in its ruling on those issues, nor that certification of the order for interlocutory appeal is appropriate. Accordingly, defendants' motions are denied.

II. Plaintiff's Motion for TRO

Plaintiff moves for a temporary restraining order enjoining defendants from enforcing the Ordinance and requiring defendants to withdraw without prejudice any motions pending in state court in cases regarding enforcement of the Ordinance. Plaintiff argues that such injunctive relief is necessary to effectuate defendants' compliance with the court's June 21 order granting plaintiff summary judgment on its first cause of action, wherein the court declared the Ordinance facially unconstitutional.

Defendants correctly point out that issuing a TRO or preliminary injunction on plaintiff's first cause of action would be procedurally inappropriate since the court has already decided that claim on the merits. Any injunction issued on the first cause of action thus must be a permanent injunction, and a permanent injunction cannot issue unless based upon a, valid, appealable judgment. *Alpine*

State Bank v. Ohio Casualty Ins. Co., 941 F.2d 554, 558-59 (7th Cir. 1991).

In reply to defendants' argument, plaintiff urges that if the court accepts defendants' premise that only permanent injunctive relief is appropriate, it should issue partial judgment on plaintiff's first cause of action and issue a permanent injunction thereon.

The court does accept defendants' premise that preliminary injunctive relief is inappropriate. Accordingly, plaintiff's motion for a TRO is denied. However, in order that it may effectuate its June 21 order declaring the Ordinance unconstitutional, the court will issue partial judgment on plaintiff's first cause of action and grant plaintiff's request for a permanent injunction. *See* accompanying partial judgment and discussion and order on permanent injunction, section III of this Order, *infra*.

III. Permanent Injunction

The court shall herein enter a permanent injunction against defendants in order to effectuate the court's order of June 21, 1993 (as modified by this order in section IV, *infra*), which granted plaintiff's motion for summary judgment on its first cause of action, declaring the Ordinance unconstitutional. The permanent injunction is further entered pursuant to the partial judgment in favor of plaintiff, entered on this day on the first cause of action.

The permanent injunction shall enjoin defendants from enforcing the Ordinance, shall free plaintiff and all hotel owners from the posting and filing requirements and all other provisions of the Ordinance. The injunction

shall further enjoin defendants from pursuing any administrative or judicial proceedings against plaintiff or any other party in state court or before any administrative body.

The injunction against pursuing any other administrative or state court proceedings is not in violation of the Anti-Injunction Act, 28 U.S.C. § 2283, since it comes under the third exception to the rule: "where necessary . . . to protect or effectuate [the court's] judgments." Such an injunction is appropriate here in order to protect the res judicata effect of the court's judgment entered today in favor of plaintiff on its first cause of action. "Such an injunction is appropriate where a federal litigant has prevailed on the merits, yet is threatened with burdensome and repetitious relitigation of the same issues in a multiplicity of actions." *Midkiff v. Tom*, 725 F.2d 502, 504 (9th Cir. 1984). An injunction against proceedings in state court should issue "to protect the party who has succeeded in the federal court . . . from being subject to the possibility of a contrary decision by the state court which would nullify or impair the effect of the federal judgment." *Id.*

Accordingly, good cause appearing, IT IS HEREBY ORDERED as follows:

1. Defendants City and County of San Francisco, Tenderloin Housing Clinic, Inc., North of Market Planning Coalition, and Brad Paul are hereby permanently enjoined and prohibited from enforcing the Residential Hotel Ordinance, from inspecting premises or records pursuant to the Residential Hotel Ordinance, and from seeking, collecting, or accepting fees or fines of any

nature (including attorneys' fees) pursuant to the Residential Hotel Ordinance.

2. Defendants are ordered to immediately withdraw without prejudice any such request for fees or fines which is now pending before any administrative body or any state court.

3. Plaintiff and any hotel in the City of San Francisco that possesses a hotel Permit of Occupancy issued by the San Francisco Department of Public Works, and which is classified as a hotel by the San Francisco Assessor's Office, are hereby permanently relieved from the posting and filing requirements and all other provisions of the Residential Hotel Ordinance, including the rules regarding maintenance and preservation of "residential units."

IV. Modification of June 21 Order

Good cause appearing, the court's June 21, 1993 order granting plaintiff's motion for summary judgment on its first cause of action is hereby amended as follows:

The text appearing at section IV.B. of the order (page 18, lines 4-12 and n.11) shall be expunged and the following text substituted in its place:

"The *Lucas* court held that a second category of cases in which a per se taking exists is where regulation denies the landowner all economically beneficial or productive uses of land. *Lucas* at 2893. Such is not the case here, as the Ordinance allows (or compels) the landowner to continue use of his property as a residential hotel, and thus the Ordinance cannot be said to deny *all* economically

productive use of the land. This finding, however, does not end the court's inquiry for, as noted by the *Lucas* court, the per se rule – which applies only to cases where the landowner has been completely deprived of his economically productive uses – does not mean that "the landowner whose deprivation is one step short of complete is not entitled to compensation." *Lucas* at 2985 n.8.

> Such an owner might not be able to claim the benefit of our categorical formulation, but, as we have acknowledged time and again, the economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed expectations are keenly relevant to takings analysis generally.

Id. (citation and internal quotation omitted).

The court thus must analyze to what extent plaintiff has been deprived of its economically productive use. Such an analysis is problematic, as acknowledged by the *Lucas* court, because the "deprivation of economically productive use" rule "does not make clear the 'property interest' against which the loss of value is to be measured." *Id.* at 2894 n.7. The Supreme Court's suggested answer to this riddle is hereby adopted by the court – the answer lies in "how the owner's reasonable expectations have been shaped by the State's law of property – *i.e.*, whether and to what degree the State's law has accorded legal recognition and protection to which the takings claimant alleges a diminution in (or elimination of) value." *Id.*

The interests that the hotel owners allege have been diminished by the Ordinance are the classic common law

property rights to exclude, to use as the owner sees fit, and to possess, and the statutorily-based right to go out of the rental business.[2] As discussed *infra* in sections IV.C. and IV.D. of this Order, those rights have been deeply trenched upon. Consequently, the economically viable uses of the hotel owners' land have been significantly diminished. Accordingly, although the plaintiff hotel owners are not denied *all* economically productive uses of their land, the court finds that the Ordinance so deeply trenches on the hotel owners' investment-backed expectations and their classic property rights to use, possess, and exclude as to constitute a deprivation of economically productive use, and thus constitute a taking."

The June 21, 1993 order on cross-motions for summary judgment is further modified as follows:

The first sentence of the text at section IV.F. of the order (page 23, lines 20-26) shall be expunged and the following text substituted in its place:

"In accordance with the foregoing discussion, this court finds that the challenged Ordinance is unconstitutional on its face because it too severely trenches on the hotel owners' reasonable investment-backed expectations, it too significantly deprives the hotel owners of three strands of their bundle of property rights, it too severely diminishes the economically viable uses of the land, and it fails to substantially advance legitimate state interests."

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[2] Granted to California landlords by the Ellis Act, Cal. Gov't Code § 7060.

A copy of the order on cross-motions for summary judgment as modified is attached hereto as Exhibit A.

CONCLUSION

In accordance with the foregoing discussion, IT IS HEREBY ORDERED as follows:

1. Defendants' motions to reconsider and certify for interlocutory appeal the court's June 21, 1993 order granting plaintiff's motion for summary judgment on its first cause of action are DENIED.

2. Plaintiff's motion for a temporary restraining order is DENIED.

3. The court, by accompanying judgment and order, shall enter partial judgment in favor of plaintiff on its first cause of action and shall grant plaintiff's request for a permanent injunction thereon.

4. Defendants City and County of San Francisco, Tenderloin Housing Clinic, Inc., North of Market Planning Coalition, and Brad Paul are hereby permanently enjoined and prohibited from enforcing the Residential Hotel Ordinance, from inspecting premises or records pursuant to the Residential Hotel Ordinance, and from seeking, collecting, or accepting fees or fines of any nature (including attorneys' fees) pursuant to the Residential Hotel Ordinance.

5. Defendants are ordered to immediately withdraw without prejudice any such request for fees or fines which is now pending before any administrative body or any state court.

6. Plaintiff and any hotel in the City of San Francisco that possesses a hotel Permit of Occupancy issued by the San Francisco Department of Public Works, and which is classified as a hotel by the San Francisco Assessor's Office, are hereby permanently relieved from the posting and filing requirements and all other provisions of the Residential Hotel Ordinance, including the rules regarding maintenance and preservation of "residential units."

7. The court's June 21, 1993 order is MODIFIED as outlined in the Discussion section of this Order.

8. The motions of plaintiff and of third party San Remo Hotel for permission for San Remo Hotel to file an amicus curiae brief regarding the motions that are the subject of this Order is DENIED.

IT IS SO ORDERED

DATED: SEP 9 1993

/s/ J.P. Vukasin, Jr.
J. P. VUKASIN, JR.
UNITED STATES
DISTRICT JUDGE

EXHIBIT A

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

GOLDEN GATE HOTEL ASSOCIATION, Plaintiff, v. CITY AND COUNTY OF SAN FRANCISCO, TENDERLOIN HOUSING CLINIC, INC., NORTH OF MARKET PLANNING COALITION, and BRAD PAUL, Defendants.	No. C-91-3386-JPV ORDER RE: CROSS-MOTIONS FOR SUMMARY JUDGMENT

INTRODUCTION

This matter came on regularly for hearing for what were, in essence, cross-motions for summary judgment. Additionally there are before the court four preliminary matters which were raised by the parties: (1) Tenderloin's request for recusal; (2) North of Market's request to certify for interlocutory appeal this Court's prior Order determining ripeness; (3) North of Market's "request" for summary judgment on the grounds that it is an improper party; and (4) Tenderloin's motion for summary judgment on the grounds that plaintiff's claim is time-barred.[1] After

[1] All co-defendants have joined in Tenderloin's second motion.

considering the file and the moving papers, and hearing oral argument, the court took the matter under submission, and now rules herewith.

BACKGROUND

Plaintiff Golden Gate Hotel Association, a trade group of San Francisco hotel owners, challenges the constitutionality of the San Francisco Residential Hotel Ordinance (hereinafter the "Ordinance"). Plaintiff's first cause of action, which is at issue in the cross-motions for summary judgment, seeks a declaratory judgment that the Ordinance constitutes a facially unconstitutional taking in violation of the fifth amendment to the United States Constitution. Defendants moved for dismissal of this first cause of action, alleging that plaintiff's challenge of the Ordinance was premature. By order dated March 12, 1992, this court denied defendants' request for dismissal of this first cause of action, determining that plaintiff's facial challenge was ripe for judicial review.

Defendant City and County of San Francisco duly enacted the Ordinance. Defendant Brad Paul is the Director of the Mayor's Office of Housing and Community Development. (For the sake of convenience, this Order will hereinafter collectively refer to defendant Brad Paul and defendant City and County of San Francisco as "San Francisco.") Defendants Tenderloin Housing Clinic, Inc. (hereinafter "Tenderloin") and North of Market Planning Coalition (hereinafter "North of Market") are non-profit advocacy groups which purport to represent individuals who have become or may become displaced when residential hotels violate the Ordinance.

THE ORDINANCE

The stated purpose of the Residential Hotel Ordinance is "to benefit the general public by minimizing adverse impact on the housing supply and on displaced low income, elderly, and disabled persons resulting from the loss of residential hotel units through their conversion or demolition."[2] To accomplish this goal, the Ordinance designates hotel rooms occupied by the same individual for 32 days or more as a "residential unit," and a "residential hotel" is any building containing a "residential unit." In order to convert a residential hotel to, for instance, a tourist hotel, the owner must obtain a permit from the city. The city will grant a permit for conversion only if the owner provides relocation assistance to hotel residents and provides for the replacement of residential hotel units being converted by one of the following ways: (1) constructing the replacement units, (2) rehabilitating other residential hotel units, (3) constructing or rehabilitating transitional emergency housing, or (4) contributing an "in lieu" fee to the city's preservation fund or a nonprofit housing group in the amount of 80 percent of the construction cost of the number of units converted, plus site acquisition costs.[3]

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[2] *See*, San Francisco Administrative Code section 41 *et. seq.*

[3] The Ordinance does provide for certain limited exemptions and exceptions which are not applicable here.

PRELIMINARY MATTERS

A. Tenderloin's Request for Recusal

In its moving papers, defendant Tenderloin requests that this Court disqualify itself on the grounds that statements made by this Court at a prior hearing in another case indicate that this Court is prejudiced against the Residential Hotel Ordinance. As this Court indicated at oral argument, disqualification is inappropriate.

First, Tenderloin's request for recusal is not properly before this Court, because: (1) Tenderloin merely included it as an informal suggestion within its motion for summary judgment, rather than as a formal noticed motion in accordance with Local Rule 220-2; and (2) Tenderloin did not properly bring the request pursuant to either 28 U.S.C. §§ 144 or 455 which require the filing in a timely fashion of affidavits stating grounds for bias or impartiality.

Second, Tenderloin is guilty of selective reading. At the time when this Court made the so called "biased" comments, this Court specifically made the comments with the stated caveat that: "So far as this Court has been made knowledgeable of the Ordinance, so far as I know about the Ordinance as I sit here today – this is *not* a final opinion or decision, but from what I have seen and heard and read about it, [and] . . . so far as the Court is familiar with it today. . . . " Reporter's Transcript at 64, June 27, 1991 hearing. It is clear from a review of the *complete* record that the Court's statements were not a final opinion of the Court and do not demonstrate bias.

Therefore, Tenderloin's informal request for recusal is DENIED.

B. North of Market's Motion for Certification

North of Market requests that this court certify its prior order determining ripeness, dated March 12, 1992, for interlocutory appeal. 28 U.S.C. § 1292(b) provides that a district judge, in his discretion, may certify an order not otherwise appealable for interlocutory appeal if "such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immedi...e appeal from the order may materially advance the ultimate termination of the litigation." This court declines to exercise such discretion.

First, this court is of the opinion that an immediate appeal from the prior order, at this time, will not materially advance the ultimate termination of this litigation. Before the court now are fully briefed and argued cross-motions for summary judgment. A decision by this court on the cross-motions will more materially advance this litigation, and may moot the question of interlocutory appeal altogether.

Second, a Supreme Court case decided after this court issued its March order further supports this Court's prior Order determining that plaintiff's first cause of action is ripe. In *Yee v. City of Escondido*, 112 S. Ct. 1522 (1992), the Supreme Court stated: "petitioners mount a facial challenge to the ordinance. . . . As [that challenge] does not depend on the extent to which petitioners are deprived of the economic use of their particular pieces of

property or to the extent to which these particular petitioners are compensated, petitioners' facial challenge is ripe." *Id.* at 4305. Likewise, plaintiff's facial challenge does not depend on the extent of compensation, and is therefore ripe.

Accordingly, North of Market's motion for certification of the prior Order determining ripeness for interlocutory appeal is DENIED.

C. North of Market's Claim That It Is an Improper Party

North of Market has filed a joinder in Tenderloin's opposition to plaintiff's motion for summary judgment and in Tenderloin's motion for summary judgment. In its joinder, North of Market asserts that it is an improper party defendant, and thus is entitled to judgment as a matter of law. North of Market contends that it is only named as a defendant with respect to the causes of action for declaratory relief, which seek declarations regarding the alleged unconstitutionality of various San Francisco ordinances. North of Market contends that declaratory relief is available only against San Francisco, the governing body that enacted the challenged laws, and not against it.

Although North of Market's arguments may seem logical at first glance, its active participation in this litigation belies its assertions that it is not a proper party to this case. North of Market has actively participated in this litigation since its inception by filing the motion to certify (discussed above), by joining in Tenderloin's second motion for summary judgment (also discussed

above), by filing numerous briefs in support of the other defendants' motions and in opposition to plaintiff's motion for summary judgment, by requesting a continuance, and by participating in oral argument. Not until now, the eleventh hour, has North of Market brought this issue to the attention of the Court, and only then by way of an informal suggestion, rather than by a properly noticed motion filed and served in accordance with Local Rule 220-2. Due to North of Market's extensive participation in this case, its contention seems unmeritorious; nonetheless, this Court declines to address the merits of an argument not properly before the court.

Therefore, North of Market's informal request for summary judgment, based on its claim to be an improper party, is DENIED.

D. Tenderloin's Second Motion for Summary Judgment

After the parties had fully briefed and argued the cross-motions for summary judgment, and while the motions were under submission, Tenderloin filed a second motion for summary judgment on September 11, 1992, contending that plaintiff's claims are barred by the statute of limitations. Defendants San Francisco and North of Market joined in Tenderloin's motion. Defendants assert that under *De Anza Properties X, Ltd. v. Santa Cruz County*, 936 F.2d 1084 (9th Cir. 1991), plaintiff must bring its facial constitutional challenge to the Ordinance under 42 U.S.C. § 1983, and such suit must be filed within one year of the enactment of the Ordinance. As plaintiff's suit was filed more than one year after enactment of the

Ordinance, defendants contend that plaintiff's claim is time-barred.

In response, plaintiff moves to strike defendants' motion, contending that defendants already had their chance to assert any affirmative defenses when filing opposition to plaintiff's motion for summary judgment and when filing their own cross-motions for summary judgment.

Whatever the merit of defendants' statute of limitations defense, it will not now be considered by the court. It would be inappropriate for the court to consider further, unrequested briefing on a motion already briefed, argued, and submitted. In the same vein, then, it would be improper for the court, having taken one motion under submission, to consider a new motion that went to the merits of the submitted motion. At bottom here is a sense of fairness; a party should not be given a chance to re-brief one motion by filing a second motion. Defendants' second motion for summary judgment is nakedly an attempt to get another bite of the apple. This court only gives one bite. Accordingly, plaintiff's motion to strike defendants' second motion for summary judgment is hereby GRANTED.

CROSS-MOTIONS FOR SUMMARY JUDGMENT

I. The Standard for Summary Judgment

Summary judgment should be granted where it is shown that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477

U.S. 317, 106 S.Ct. 2548 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505 (1986). In *Celotex*, the Supreme Court made it clear that summary judgment, when appropriate, is a favored method of resolution, and that:

> summary judgment is mandated, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial.

Celotex, 477 U.S. at 322, 106 S.Ct. at 2552.

In addition, the Court emphasized in *Anderson* that, under Fed. R. Civ. P. 56(e), "when a properly supported motion for summary judgment is made, the adverse party 'must set forth specific facts showing that there is a genuine issue for trial.' " *Anderson*, 477 U.S. at 250, 106 S.Ct. at 2511.

II. Overview

The issue before this Court, on what are essentially cross-motions for summary judgment, is whether the Residential Hotel Ordinance, on its face, violates the takings clause of the fifth amendment to the United States Constitution.[4] The takings clause of the fifth amendment provides: "[N]or shall private property be taken for public use, without just compensation." This guarantee of the

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[4] Plaintiffs challenge the constitutionality of the Ordinance on its face, as opposed to challenging the constitutionality of the Ordinance as applied.

fifth amendment, that private property shall not be taken for a public use without just compensation, was designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. *Armstrong v. United States*, 80 S. Ct. 1563, 1569 (1959). The question in this case is whether the uncompensated restrictions imposed by the Residential Hotel Ordinance force the hotel owners to bear more than a fair share of obligations which are rightfully those of society as a whole.

Legislation can constitute an unconstitutional taking in two different ways: (1) a taking by physical occupation; and (2) a taking by regulation. Plaintiff contends that the Ordinance violates the takings clause in both manners. The court will address plaintiff's claims under these distinct categories in turn.

III. Taking by Physical Occupation

The physical occupation cases delineate a fairly clear standard: "Where the government authorizes a physical occupation of property (or actually takes title), the Takings Clause generally requires compensation. See, *e.g.*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982)." *Yee v. City of Escondido*, 112 S. Ct. 1522, 1526 (1992).

Defendants argue that the opinion in *Yee* conclusively forecloses any challenge by the plaintiff that the Residential Hotel Ordinance constitutes an unconstitutional taking by physical occupation. This Court disagrees.

Yee involved a challenge to the City of Escondido's Rent Control Ordinance as it applied to mobile home parks in conjunction with the California Mobilehome Residency Law, Cal. Civ. Code § 798. The Mobilehome Residency Law limits the basis upon which a park owner can terminate a mobile home owner's tenancy – the park owner may not require the removal of a mobile home when it is sold, nor charge a transfer fee for the sale or disapprove of the purchaser, provided the purchaser can pay rent. Further, park owners in *Yee* were affected by a 1988 local rent control ordinance which set rents back to their 1986 levels and prohibited rent increases without approval of the City Council. Thus, under this combination of laws, mobile home park owners in *Yee* were, in essence, precluded from setting rents or choosing their tenants.

Faced with that factual record, the Supreme Court held that "[t]he government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land." *Id.* at 1528 (emphasis in the original). Because the park owners voluntarily rented their land to the mobile home owners, and the Mobilehome Residency Law allows a park owner to change the use of his land, the Court held that no taking by physical occupation occurred. The Court reasoned that:

> [The land owners] voluntarily rented their land to mobile home owners. At least on the face of the regulatory scheme, neither the City nor the State compels [the land owners], once they have rented their property to tenants, to continue

> doing so. To the contrary, the Mobilehome Residency Law provides that a park owner who wishes to change the use of his land may evict his tenants, albeit with six or twelve months notice. Cal. Civ. Code Ann. § 798.56(g).

Id.

In the instant case, as in Yee, the land owners voluntarily rented their land to the tenants in the first instance. However, the land owners in this case (unlike those in *Yee*) are denied, for all practical purposes, the freedom to terminate such rentals. Under the Residential Hotel Ordinance, hotel owners can discontinue rentals only by providing for relocation assistance to hotel residents and providing for the replacement of residential hotel units being converted by either (1) constructing the replacement units, (2) rehabilitating other residential hotel units, (3) constructing or rehabilitating transitional emergency housing, or (4) contributing an "in lieu" fee to the city's preservation fund or a nonprofit housing group in the amount of 80 percent of the construction cost of the number of units converted, plus site acquisition costs.

Thus, unlike the laws at issue in *Yee*, the Residential Hotel Ordinance provides that a hotel owner who wishes to change the use of his land may not simply evict his tenants, but must pay a king's ransom in order to discontinue the use of his property as a residential hotel. Even the *Yee* court acknowledged that "[a] different case would be presented were the statute . . . to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy." *Yee* at 1529.

"The one incontestable case for compensation (short of formal expropriation) seems to occur when the government deliberately brings it about that its agents, or the public at large, 'regularly' use, or 'permanently' occupy, space or a thing which theretofore was understood to be under private ownership." Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law,* 80 Harv. L. Rev. 1165, 1184 (1967), quoted with approval in *Loretto v. Teleprompter Manhattan CATV Corp.*, 102 S. Ct. 3164 (1981). In this case, San Francisco, by enacting the Ordinance, has enabled members of the public to "regularly" use and "permanently" occupy property privately owned by the plaintiffs. Through the Residential Hotel Ordinance, San Francisco exercises forced control over the hotel owners' possessory interests in their properties, including the denial of the hotel owners' right to exclude others.

Under the traditional conception of property, the right to exclude has long been recognized as "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna v. United States,* 444 U.S. 164, 176 (1979). *See also, Loretto,* 102 S. Ct. at 3176 ("[t]he power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights"). Where, as here, the hotel owners are forced to accept the occupation of their properties, the resulting deprivation of property rights is sufficient to constitute a physical taking for which compensation is required under the Fifth Amendment.

In conclusion, this Court finds that, unlike the state and local laws at issue in *Yee,* the Residential Hotel Ordinance, on its face, has effected a per se physical taking

because it interferes so drastically with the hotel property owner's fundamental rights to possess and exclude as to amount to compelled physical occupation.

IV. Regulatory Taking

Even if the Residential Hotel Ordinance was not found to be a physical taking, it would still be facially invalid because it further constitutes a regulatory taking without just compensation. "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

Since the inception of regulatory takings jurisprudence, "70-odd years" ago, the Supreme Court has avoided the enunciation and application of a "set formula" for determining just how far is too far. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2893 (1992). Indeed, one commentator has opined that the distinction between a regulation and a taking has become "the most haunting jurisprudential problem in the field of contemporary land-use law . . . one that may be the lawyer's equivalent of the physicist's hunt for the quark." Haar, Land-Use Planning 766 (3d ed. 1976). The Supreme Court itself has numerous times noted that no reliable test exists for distinguishing a taking from a regulation.[5]

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[5] *See, e.g., Keystone Bituminous Coal Assn. v. DeBenedictis*, 107 S. Ct. 1232, 1237 (1987) (emphasizing that takings decisions can be reached only after examination of "the particular facts"); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) ("[w]e have never precisely determined those circumstances where land-use regulations amount to takings"); *Penn-Central*

What has emerged from the body of Supreme Court regulatory jurisprudence is the abiding notion that each case must be analyzed closely for its own factual nuances. Reference to a past situation where a taking has been found can be instructive, but often not controlling. Nonetheless, several factors have been regularly considered by the Court as particularly significant. These include the following:

a) the character of the governmental regulation;[6]

b) whether the regulation has deprived the property owner of all viable uses of his property;[7]

Transp. Co. v. New York City, 438 U.S. 104 (1978) (takings analysis involves "essentially ad hoc, factual inquiries"); *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962) ("no set formula to determine where regulation ends and taking begins"). *See also* Tribe, American Constitutional Law § 9-4, n.2 for these and further references.

[6] *See, e.g., Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2893 (1992) (one "discrete categor[y]" of actions regularly held to be a taking are "regulations that compel the property owner to suffer a physical 'invasion' of his property"); *Loretto v. Teleprompter Manhattan CATV Corp.*, 102 S. Ct. 3164 (1982) (law requiring landlords to allow television cable companies to emplace cable facilities in their apartments constituted a taking); *Kaiser Aetna v. United States*, 100 S. Ct. 383 (1979) imposition of navigational servitude upon private marina constituted a taking); *United States v. Causby*, 66 S. Ct. 1062, 1068 (1946) (allowing regular flights low over plaintiff's land deprived plaintiff of use of land as chicken farm and thus constituted a taking).

[7] *See. e.g., Lucas*, 112 S. Ct. at 2893 (second discrete category of per se regulatory taking is where "regulation denies all

c) whether the regulation has deprived the owner of his reasonable investment-backed expectations;[8]

d) whether the regulation has deprived the owner of any sticks from his bundle of property rights.[9]

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economically beneficial or productive use of land"); *Agins v. City of Tiburon*, 100 S. Ct. 2138, 2141 (1980) (law effects a taking if it "denies an economically viable use of his land"); *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141, 3147 (1987) (land-use regulation does not effect a taking if it does not "deny an owner economically viable use of his land").

[8] *See, e.g., Lucas*, 112 S. Ct. at 2895 n.8 ("as we have acknowledged time and again, '[t]he economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed expectations' are keenly relevant to takings analysis generally") (quoting *Penn Central*, 98 S. Ct. at 2659); *Ruckelshaus v. Monsanto Co.*, 104 S. Ct. 2862, 2874 (1984) (regulation's lack of "interference with reasonable investment-backed expectations" dispositive in holding regulation does not constitute a taking); *Kaiser Aetna*, 100 S. Ct. at 393 (actions if Hawaii state government led to fruition of expectancies on part of marina builders – "expectancies that . . . the Government must pay for before it takes over the management of the landowner's property").

[9] *See, e.g., Nollan*, 107 S. Ct. at 3145-46 (court deems it "obvious" that a direct state appropriation of an easement across plaintiff's beachfront property would constitute a taking of plaintiff's right to exclude others – "one of the most essential sticks in the bundle of rights that are commonly characterized as property" – and thus constitute a taking if no sufficient nexus between purpose behind valid building moratorium and purpose behind requiring permit for plaintiff to build); *Andrus v. Allard*, 100 S. Ct. 318, 327 (1979) (destruction of one strand in bundle of property rights does not necessarily constitute a taking when owner possesses a full bundle, "because the

e) whether the regulation substantially advances a legitimate state interest.[10]

In its takings cases, the Court considers the above listed factors within the context of the great purpose behind the just compensation clause: "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 80 S. Ct. 1563, 1569 (1960). *See also Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 123-125 (1978).

With these principles of analysis in mind, this court will now perform a factual analysis of the challenged Ordinance.

A. Character of the Ordinance

The character of the challenged governmental action, as found in the previous section of this Order, is a physical taking. This court finds that the Ordinance so wholly destroys the landowner's right to exclude as to amount to a compelled physical occupation of his property. Such a

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aggregate must be viewed in its entirety"). *Compare Penn Central*, 98 S. Ct. 2646 (no single strand totally destroyed, no taking found) *and Agins*, 100 S. Ct. 2138 (no single strand totally destroyed, no taking found).

[10] *See, e.g., Lucas*, 112 S. Ct. at 2897 ("land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests"); *Nollan*, 107 S. Ct. at 3147 ("a use restriction may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial government purpose"); *Agins*, 100 S. Ct. at 2141-42 (zoning regulations limiting land-use to single-family dwellings found to substantially advance legitimate governmental goals, no taking found).

taking, as noted by the Court in *Lucas*, 112 S. Ct. at 2893, constitutes a per se taking. However, as noted earlier, this court is proceeding in this part of its inquiry into the constitutionality of the Ordinance as if the Ordinance did not constitute a physical invasion. Thus, for the purposes of this analysis, the court will treat the Ordinance as a public program adjusting the benefits and burdens of economic life to promote the common good, thus finding the Ordinance less offensive in character than if it were an actual physical invasion. *Penn Central* at 2659.

B. Deprivation of All Economically Viable Uses

The *Lucas* court held that a second category of cases in which a per se taking exists is where regulation denies the landowner all economically beneficial or productive uses of land. *Lucas* at 2893. Such is not the case here, as the Ordinance allows (or compels) the landowner to continue use of his property as a residential hotel, and thus the Ordinance cannot be said to deny all economically productive use of the land. This finding, however, does not end the court's inquiry for, as noted by the *Lucas* court, the per se rule – which applies only to cases where the landowner has been completely deprived of his economically productive uses – does not mean that "the landowner whose deprivation is one step short of complete is not entitled to compensation." *Lucas* at 2985 n.8.

> Such an owner might not be able to claim the benefit of our categorical formulation, but, as we have acknowledged time and again, the economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed

> expectations are keenly relevant to takings analysis generally.

Id. (citation and internal quotation omitted).

The court thus must analyze to what extent plaintiff has been deprived of its economically productive use. Such an analysis is problematic, as acknowledged by the *Lucas* court, because the "deprivation of economically productive use" rule "does not make clear the 'property interest' against which the loss of value is to be measured." *Id.* at 2894 n.7. The Supreme Court's suggested answer to this riddle is hereby adopted by the court – the answer lies in "how the owner's reasonable expectations have been shaped by the State's law of property – *i.e.*, whether and to what degree the State's law has accorded legal recognition and protection to which the takings claimant alleges a diminution in (or elimination of) value." *Id.*

The interests that the hotel owners allege have been diminished by the Ordinance are the classic common law property rights to exclude, to use as the owner sees fit, and to possess, and the statutorily-based right to go out of the rental business.[11] As discussed *infra* in sections IV.C. and IV.D. of this Order, those rights have been deeply trenched upon. Consequently, th economically viable uses of the hotel owners' land ha been significantly diminished. Accordingly, although the plaintiff hotel owners are not denied *all* economically productive uses of their land, the court finds that the Ordinance so

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[11] Granted to California landlords by the Ellis Act, Cal. Gov't Code § 7060.

deeply trenches on the hotel owners' investment-backed expectations and their classic property rights to use, possess, and exclude as to constitute a deprivation of economically productive use, and thus constitute a taking.

C. Deprivation of Reasonable Investment-Backed Expectations[12]

With respect to the third factor identified earlier as particularly significant, the court finds fatal constitutional shortcomings in the Ordinance. Because of the relocation assistance and replacement cost provisions, the significant effects of the Residential Hotel Ordinance are: (1) to require hotel owners to maintain and preserve units as "residential"; and (2) to prohibit hotel owners from altering or demolishing their buildings or converting them to any other use. The Ordinance is constitutionally infirm because its provisions substantially impair the reasonable investment-backed expectations of the hotel owners in two fundamental ways.

First, California law has accorded strong legal recognition and protection to the particular interest in land with respect to which the hotel owners allege a diminution and elimination of value. Specifically, the Ellis Act, codified at § 7060 of the California Government Code,

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[12] The court acknowledges that analysis of a land owner's reasonable investment-backed expectations normally is performed relative to the challenge of an ordinance *as applied*, rather than relative to a challenge on the ordinance's face. This is due at least partly to the sparsity of the record usually presented on a facial challenge. Here, the court finds that the record before it lends itself to the following analysis.

preserves the fundamental right of landlords to go out of the rental business. The California Legislature adopted the Ellis Act in direct response to the California Supreme Court's decision in *Nash v. City of Santa Monica,* 207 Cal. Rptr. 285 (1985), where the Court held that an ordinance that prohibited conversion or demolition of rental units did not violate state law or constitute a regulatory taking when a landlord received a fair return on his investment. The Ellis Act explicitly overrules *Nash* "so as to permit landlords to go out of business." Cal. Govt. Code § 7060.7. The hotel owners' reasonable investment-backed expectations thus are shaped by California property law and particularly the Ellis Act, just as the marina builder's expectations were shaped by Hawaii state law in *Kaiser Aetna v. United States,* 100 S. Ct. 383 (1979). There, the Court held that the actions of the Hawaii State government in inducing the plaintiff builders to construct a marina out of formerly unnavigable land led to the "fruition of expectancies" on the part of plaintiffs – "expectancies that . . . the Government must pay for before it takes over the management of the landowner's property." *Id.* at 393.[13] Like the law at issue in *Kaiser Aetna,* the Ordinance

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[13] *See also Lucas,* 112 S. Ct. at 2894, n.7, where the Court suggested that "deprivation of all economically feasible use" is to be measured by comparison of:

(1) diminished value of property (due to effect of the challenged regulation), and

(2) the owner's reasonable expectations shaped by the State's law of property – with respect to which the owner alleges a diminution in value.

here deprives the hotel owners of reasonable expectancies; this factor militates toward requiring just compensation.

The court finds that the hotel owners' reasonable investment-backed expectations are deprived in a second way. When investing in the hotels, the owners reasonably anticipated that their classic property rights – those making up the so-called bundle of rights – would be respected and upheld. As discussed below, these expectations were frustrated. Such frustration, together with the deprivation of the hotel owners' expectation that the Ellis Act would allow them to get out of the residential hotel business, leads this court to find and hold that the Ordinance is unconstitutional because it too severely trenches on the reasonable investment-backed expectations of the hotel owners.

D. Deprivation of Classic Property Rights

The court turns now to a consideration of the hotel owners' "bundle of rights." Here, it finds that the Ordinance is constitutionally infirm because it significantly deprives the owners of three important strands in their bundle.

First, by effectively preventing hotel owners from altering or demolishing their buildings and converting them to another lawful use, the Ordinance denies the hotel owners of any right to use his property as he sees fit. Any hotel owner who purchased the property solely to turn it into a profitable investment by renovating or

replacing existing structures with new ones is effectively deprived of the right to do so.

Second, by designating certain units as "residential" and requiring that those units remain residential (or, alternatively, subjecting the hotel owners to the substantial costs of relocation and replacement), the Ordinance becomes a coerced rental provision, thereby depriving hotel owners of the fundamental right to possess their properties.

Third, this coercion has the effect of requiring owners to rent to specific tenants, i.e. "residential" tenants, whom they might otherwise not wish to rent to, and thus deprives hotel owners in their right to exclude.

Consequently, the court finds that the practical effect of the Ordinance is to abrogate ownership and developmental rights by drastically interfering with the hotel owners' rights to exclude from, to use, and to possess their property. While a law depriving an owner of only one strand within his bundle of rights may not constitute a taking, *Andrus v. Allard*, 100 S. Ct. 318, 327 (1979), this court holds that here, the deprivation of three important strands – including the right to exclude ("one of the most essential sticks in the bundle," *Nollan*, 107 S. Ct. at 3141) – constitutes a taking for which just compensation is due.

E. Legitimate State Interest

A land-use regulation that does not substantially advance a legitimate state interest runs afoul of the takings clause. *Nollan*, 107 S. Ct. at 3147. The Supreme Court has held that, although the cases don't elaborate on the

point, nonetheless "a broad range of governmental purposes" satisfy the requirement of a legitimate state interest. *Id.*

Here, the stated purpose of the Ordinance is "to benefit the public by minimizing adverse impact on the housing supply and on displaced low income, elderly, and disabled persons resulting from the loss of residential hotel units through their conversion or demolition." This court grants that the problem of homelessness is a lamentable illness of this society, and that relieving that problem is a legitimate state interest. However, the interest stated by the Ordinance – alleviating the problem of homelessness caused by the conversion and demolition of residential hotel units – is too narrow an interest to qualify as legitimate.

Even if the stated purpose of the Ordinance were the broader – and more legitimate – purpose of relieving homelessness in general, the Ordinance would then violate the takings clause because it would lack an "essential nexus" between the purpose and the means chosen to achieve that purpose. *Nollan*, 107 S. Ct. at 3148. The Ordinance illogically places the blame for the social ill of homelessness on the shoulders of residential hotel owners; it singles out a few to bear the costs which should be borne by the many – a constitutionally impermissible governmental act. *Armstrong*, 80 S. Ct. at 1569. As the New York Court of Appeals held when faced by a similar residential hotel ordinance:

> [Under *Nollan*,] the heavy exactions imposed by [the New York ordinance] must "substantially advance" its putative purpose of relieving homelessness. No such showing of this required

> close "nexus" has been made. Rather, the nexus between the obligations placed on [residential hotel] property owners and the alleviation of the highly complex social problem of homelessness is indirect at best and conjectural. Such a tenuous connection between means and ends cannot justify singling out this group of property owners to bear the costs required by the law toward the cure of the homeless problem.

Seawall Associates v. City of New York, 542 N.E.2d 1059, 1069 (1989). The same analysis applies with equal force to the case at bar; the Ordinance fails to "substantially advance" the governmental interest in relieving homelessness, and thus requires the payment of just compensation to the landowner. *Nollan*, 107 S. Ct. at 3147.

F. Summary

In accordance with the foregoing discussion, this court finds that the challenged Ordinance is unconstitutional on its face because it too severely trenches on the hotel owners' reasonable investment-backed expectations, it too significantly deprives the hotel owners of three strands of their bundle of property rights, it too severely diminishes the economically viable uses of the land and it fails to substantially advance legitimate state interests. Any of these three reasons alone would convince the court of the Ordinance's unconstitutionality; together, they make its legal infirmity apodictical.

V. Conclusion

In conclusion, this Court finds that the Residential Hotel Ordinance effects an unconstitutional taking by

physical occupation, and an unconstitutional regulatory taking for the reasons stated herein. Plaintiffs, hotel owners, voluntarily provided some low-income housing by operating their properties on a residential basis for a period of time. Rather than commending the hotel owners for their efforts to help low-income individuals, defendant San Francisco enacted the Residential Hotel Ordinance, effectively placing plaintiffs into perpetual servitude by forcing them to remain in the residential rental business and preventing them from changing businesses. Such an ordinance is impermissible under the constitution.

As Justice Scalia so clearly and persuasively stated:

> The traditional manner in which American government has met the problem of those who cannot pay reasonable prices for privately sold necessities – a problem caused by the society at large – has been the distribution to such persons of funds raised from the public at large through taxes, either in cash (welfare payments) or in goods (public housing, publicly subsidized housing, and food stamps). Unless we are to abandon the guiding principle of the Takings Clause that "public burdens . . . should be borne by the public as a whole," *Armstrong*, 80 S.Ct. at 1569, this is the only manner that our Constitution permits. The fact that the government acts through the landlord-tenant relationship does not magically transform general public welfare, which must be supported by all the public, into mere "economic regulation" which can disproportionately burden particular individuals. Here the city is not "regulating" rents in the relevant sense of preventing rents that are excessive;

> rather, it is using the occasion of rent regulation (accomplished by the rest of the Ordinance) to establish a welfare program privately funded by those landlords who happen to have ["residential"] tenants.
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> *Pennell v. City of San Jose*, 108 S.Ct. 849, 862-3 (1988) (Scalia, J. concurring in part and dissenting in part).

ORDER

In accordance with the foregoing discussion, IT IS HEREBY ORDERED THAT:

1. Defendant Tenderloin's request for recusal is DENIED.

2. Defendant North of Market's motion to certify for interlocutory appeal this Court's Order of March 12, 1992 determining ripeness is DENIED.

3. Defendant North of Market's informal request for summary judgment, based on its claim to be an improper party, is DENIED.

4. Plaintiff's motion to strike defendants' second motion for summary judgment (wherein defendants contended plaintiff's claims are time-barred) is GRANTED.

5. Defendants' first motion for summary judgment is DENIED.

6. Plaintiff's motion for summary judgment on its first cause of action is GRANTED.

IT IS SO ORDERED

DATED: _____

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J. P. VUKASIN, JR.
UNITED STATES
DISTRICT JUDGE

CHAPTER 41

RESIDENTIAL HOTEL UNIT CONVERSION AND DEMOLITION

Sec. 41.1. Title.
Sec. 41.2. Purpose.
Sec. 41.3. Findings.
Sec. 41.4. Definitions.
Sec. 41.5. Applicability of this Chapter.
Sec. 41.6. Initial Status Determination.
Sec. 41.7. Statements of Exemption; Applicability of this Chapter.
Sec. 41.8. Requirements for Nonprofit Organizations.
Sec. 41.9. Records of Use.
Sec. 41.10. Annual Unit Usage Report.
Sec. 41.11. Administration.
Sec. 41.12. Permit to Convert.
Sec. 41.13. One-for-one Replacement.
Sec. 41.14. Mandatory Denial of Permit to Convert.
Sec. 41.15. Approval and Issuance of Permit to Convert.
Sec. 41.16. Appeal of Denial or Approval of Permit to Convert.
Sec. 41.17. Rights of Permanent Residents.
Sec. 41.18. Demolition.
Sec. 41.19. Temporary Change of Occupancy.
Sec. 41.20. Unlawful Conversion; Remedies; Fines.
Sec. 41.21. Annual Review of Residential Hotel Status.
Sec. 41.22. Construction.

SEC. 41.1. TITLE. This Chapter shall be known as the Residential Hotel Unit Conversion and Demolition Ordinance. (Added by Ord. 121-90, App. 4/12/90)

SEC. 41.2. PURPOSE. It is the purpose of this ordinance to benefit the general public by minimizing adverse impact on the housing supply and on displaced

low income, elderly, and disabled persons resulting from the loss of residential hotel units through their conversion and demolition. This is to be accomplished by establishing the status of residential hotel units, by regulating the demolition and conversion of residential hotel units to other uses, and by appropriate administrative and judicial remedies. (Added by Ord. 121-90, App. 4/12/90)

SEC. 41.3. FINDINGS. The Board of Supervisors finds that:

(a) There is a severe shortage of decent, safe, sanitary and affordable rental housing in the City and County of San Francisco and this shortage affects most severely the elderly, the disabled and low-income persons.

(b) The people of the City and County of San Francisco, cognizant of the housing shortage of San Francisco, on November 4, 1980, adopted a declaration of policy to increase the city's housing supply by 20,000 units.

(c) Many of the elderly, disabled and low-income persons and households reside in residential hotel units.

(d) A study prepared by the Department of City Planning estimated that there were only 26,884 residential hotel units in the City in December of 1979, a decrease of 6,098 such units from 1975. Since enactment of this Chapter, residential hotel units have continued to decrease, at a slower rate: in 1981, there were 20,466 residential hotel units as defined by this Chapter; in 1988, there were 18,723 residential hotel units, a decrease of 1,743 over a period of 7 years. The decrease is caused by vacation, conversion or demolition of residential hotel units. Continued vacation, conversion or demolition of residential

hotel units will aggravate the existing shortage of affordable, safe and sanitary housing in the City and County of San Francisco.

(e) As a result of the removal of residential hotel units from the rental housing market, a housing emergency exists within the City and County of San Francisco for its elderly, disabled and low-income households.

(f) Residential hotel units are endangered housing resources and must be protected.

(g) The Board of Supervisors and the Mayor of the City and County of San Francisco recognized this housing emergency and enacted an ordinance which established a moratorium on the demolition or conversion of residential hotel units to any other use. The moratorium ordinance became effective on November 21, 1979.

(h) The conversion of residential hotel units affects those persons who are least able to cope with displacement in San Francisco's housing market.

(i) It is in the public interest that conversion of residential hotel units be regulated and that remedies be provided where unlawful conversion has occurred, in order to protect the resident tenants and to conserve the limited housing resources.

(j) The tourist industry is one of the major industries of the City and County of San Francisco. Tourism is essential for the economic well being of San Francisco. Therefore, it is in the public interest that a certain number of moderately priced tourist hotel units be maintained especially during the annual tourist season between May 1st and September 30th.

(k) Tourist activity has increased steadily in San Francisco since 1983. There are currently approximately 23,000 tourist hotel units in the City and over 3,000 additional such units will be added by 1988 through new construction. However, there are presently only 18,723 residential hotel units and this number is not increasing. In addition, rents for residential hotel units have risen an average of 23 percent annually since 1980, making such units less and less affordable as a housing resource for the elderly, disabled and low-income persons. Since the adoption of this ordinance, hotel owners have begun to leave residential units vacant during the non-tourist season (October 1st – April 30th) in order to rent these units to tourists at high daily rental rates during the tourist season (May 1st – September 30th). This activity, which further reduces the available supply of low and moderate income housing in San Francisco, is not presently prohibited under this Chapter. In order to assure that residential hotel owners do not continue to withhold these available residential units from prospective permanent residents during the non-tourist season, it is necessary to restrict the tourist season rental of vacant residential hotel units. Such a restriction will not interfere with San Francisco's tourism, which remains essential to the economic well-being of the City.

(l) Since enactment of this Chapter, it has become apparent that portions of this Chapter were difficult and extremely costly to interpret and enforce, resulting in an inability to fulfill the essential intent of this Chapter and to prevent illegal conversions.

(m) Since enactment of this Chapter, residential units have been converted to tourist units and the hotel

operators have paid the 40 percent in-lieu fee to the City. This amount, 40 percent of the cost of construction of comparable units plus site acquisition cost, has not been adequate to provide replacement units. Federal, state and local funds were incorrectly assumed at that time to be available and sufficient to make up the shortfall between the 40 percent in-lieu fee and actual replacement costs. For example, in 1979 the federal government was spending 32 billion dollars on housing and is spending only 7 billion dollars in 1989.

(n) Certain uses provide both living accommodation and services, such as health care, personal care and counseling, to residents of the City. Examples of such uses are hospital, skilled nursing facility, AIDS hospice, intermediate care facility, asylum, sanitarium, orphanage, prison, convent, rectory, residential care facility for the elderly, and community care facility. Such facilities are often operated in buildings owned or leased by non-profit organizations and provide needed services to the City's residents. To subject such facilities to the provisions of this Chapter may deter future development of such facilities. It is desirable that such facilities exist and the City should encourage construction and operation of such facilities.

(o) In addition, a form of housing facilities called "transitional housing" provides housing and supportive services to homeless persons and families and is intended to facilitate the movement of homeless individuals and families to independent living or longer term supportive residences in a reasonable amount of time. Transitional housing has individual living quarters with physical characteristics often similar to a residential hotel (i.e.

accommodations which provide privacy to residents) and provides a source of interim housing for homeless individuals and families seeking to live independently.

(p) The City's public, quasi-public and private social agencies serving the elderly and needy persons often find it difficult to immediately locate suitable housing units for such persons returning to independent living after hospitalization or upon leaving skilled-nursing or intermediate care facilities within a short time after their discharge from a health facility. Such persons often will require minimum supervision and other interim social service support. The provision of a stable number of housing units for such emergency needs until permanent housing can be secured and supportive services arranged are necessary and desirable for the City. Emergency housing will have physical characteristics similar to "transitional housing" and is often intended to be occupied for a period of less than one month.

(q) The City also wishes to provide positive incentive to encourage residential hotel owners and operators to comply with the terms of this Chapter. Hotel owners have expressed a need to rent certain residential units on a short term basis during the winter months. In an effort to address this need and to encourage compliance with this Chapter, the City wishes to provide an opportunity to hotel owners who have complied with the terms of this Chapter to rent a limited number of residential units to tourists during the winter months. (Added by Ord. 121-90, App. 4/12/90)

SEC. 41.4. DEFINITIONS. (a) **Certificate of Use.** Following the initial unit usage and annual unit usage

determination pursuant to the provisions of Sections 41.6 and 41.10 below, every hotel shall be issued a certificate of use specifying the number of residential and tourist units herein.

(b) **Comparable Unit.** A unit which is similar in size, services, rental amount and facilities, and which is located within the existing neighborhood or within a neighborhood with similar physical and socioeconomic conditions.

(c) **Conversion.** The change or attempted change of the use of a residential unit as defined in subsection (q) below to a tourist use, or the elimination of a residential unit or the voluntary demolition of a residential hotel. However, a change in the use of a residential hotel unit into a noncommercial use which serves only the needs of the permanent residents, such as resident's lounge, storeroom or common area, shall not constitute a conversion within the meaning of this Chapter.

(d) **Disabled Person.** A recipient of disability benefits.

(e) **Elderly Person.** A person 62 years of age or older.

(f) **Emergency Housing.** A project which provides housing and supportive services to elderly or low-income persons upon leaving a health facility and which has its primary purpose of facilitating the return of such individuals to independent living. The emergency housing shall provide services and living quarters pursuant to Section 41.13 herein and may be provided as part of a "transitional housing" project.

(g) **Hotel.** Any building containing six or more guest rooms intended or designed to be used, or which are used, rented or hired out to be occupied or which are occupied for sleeping purposes and dwelling purposes by guests, whether rent is paid in money, goods, or services. It includes motels, as defined in Chapter XII, Part II of the San Francisco Municipal Code (Housing Code), but does not include any jail, health facilities as defined by Section 1250 of the Health and Safety Code, asylum, sanitarium, orphanage, prison, convent, rectory, residential care facility for the elderly as defined in Section 1569.2 of the Health and Safety Code, residential facilities as defined in Section 1502 of the Health and Safety Code or other institution in which human beings are housed or detained under legal restraint, or any private club and nonprofit organization in existence on September 23, 1979; provided, however, that nonprofit organizations which operated a residential hotel on September 23, 1979 shall comply with the provisions of Section 41.8 herein.

(h) **Interested Party.** A permanent resident of a hotel, or his or her authorized representative, or a former tenant of a hotel who vacated a residential unit within the past 90 days preceding the filing of complaint or court proceeding to enforce the provisions of this Chapter. Interested party shall also mean any nonprofit organization, as defined in Section 41.4(k), which has the preservation or improvement of housing as a stated purpose in its articles of incorporation and/or bylaws.

(i) **Low-Income Household.** A household whose income does not exceed 60 percent of the median income for the San Francisco Standard Metropolitan Statistical Area as published by the United States Department of

Housing and Urban Development and Housing and Community Development Act of 1974.

(j) **Low-Income Housing.** Residential units whose rent may not exceed 30 percent of the gross monthly income of a low-income household as defined in subsection (i) above.

(k) **Nonprofit Organization.** An entity exempt from taxation pursuant to Title 26, Section 501 of the United States Code.

(l) **Operator.** An operator includes the lessee or any person or legal entity whether or not the owner, who is responsible for the day-to-day operation of a residential hotel and to whom a hotel license is issued for a residential hotel.

(m) **Owner.** Owner includes any person or legal entity holding any ownership interest in a residential hotel.

(n) **Permanent Resident.** A person who occupies a guest room for at least 32 consecutive days.

(o) **Posting or Post.** Where posting is required by this Chapter, material shall be posted in a conspicuous location at the front desk in the lobby of the hotel, or if there is no lobby, in the public entranceway. No material posted may be removed by any person except as otherwise provided in this Chapter.

(p) **Residential Hotel.** Any building or structure which contains a residential unit as defined in (q) below unless exempted pursuant to the provisions of Sections 41.5 or 41.7 below.

(q) **Residential Unit.** Any guest room as defined in Section 203.7 of Chapter XII, Part II of the San Francisco Municipal Code (Housing Code) which had been occupied by a permanent resident on September 23, 1979. Any guest room constructed subsequent to September 23, 1979 or not occupied by a permanent resident on September 23, 1979 shall not be subject to the provisions of this Chapter; provided however, if designated as a residential unit pursuant to Section 41.6 of this Chapter or constructed as a replacement unit, such residential units shall be subject to the provisions of this Chapter.

(r) **Tourist Hotel.** Any building containing six or more guest rooms intended or designated to be used for commercial tourist use by providing accommodation to transient guests on a nightly basis or longer. A tourist hotel shall be considered a commercial use pursuant to City Planning Code Section 216(b) and shall not be defined as group housing permitted in a residential area under City Planning Code Section 209.2.

(s) **Tourist Unit.** A guest room which was not occupied on September 23, 1979, by a permanent resident or is certified as tourist unit pursuant to Sections 41.6, 41.7 or 41.8 below. Designation as a tourist unit under this Chapter shall not supersede any limitations on use pursuant to the Planning Code.

(t) **Transitional Housing.** A project which provides housing and supportive services to homeless persons and families or low-income households at risk of becoming homeless which has as its purpose facilitating the movement of homeless individuals or at-risk low-income households to independent living within a reasonable

amount of time. The transitional housing shall provide services and living quarters as approved by the Planning Commission that are similar to the residential unit being replaced pursuant to Section 41.13 herein and shall comply with all relevant provisions of City ordinances and regulations. (Added by Ord. 121-90, App. 4/12/90)

SEC. 41.5. APPLICABILITY OF THIS CHAPTER. The provisions of this Chapter shall not apply to:

(a) The change in use of a residential unit where the unit has been found to be unfit for human habitation prior to November 23, 1979 and ordered to be vacated by the Department of Public Health; or

(b) A hotel wherein 95 percent of the guest rooms were tourist units on September 23, 1979; or

(c) A unit which rented for over $1,000 per month on September 23, 1979; or

(d) A hotel in which 95 percent of the total number of guest rooms rented for more than $1,000 per month on September 23, 1979; or

(e) A building which was unlawfully converted to a rooming house or hotel in violation of the provisions of the City Planning Code; or

(f) A building which meets the requirements of Section 41.7(c) below for a claim of exemption for partially-completed conversions; or

(g) A building which meets the requirements of Section 41.7(b) below for a claim of exemption for low-income housing; or

(h) A building which is lawfully approved by the City after September 23, 1979, and is not a replacement unit pursuant to Section 41.13 herein, so long as it is operated by a public entity or a nonprofit organization as a jail, health facilities as defined by Section 1250 of the Health and Safety Code, asylum, sanitarium, orphanage, prison, convent, rectory, residential care facility for the elderly as defined in Section 1569.2 of the Health and Safety Code, residential facilities as defined in Section 1502 of Health and Safety Code, or other institution in which human beings are housed or detained under legal restraint. (Added by Ord. 121-90, App. 4/12/90)

SEC. 41.6. INITIAL STATUS DETERMINATION. (a) **Filing of Initial Status Determination; Time Limit.** Within 30 calendar days of the mailing date of the summary of the ordinance and the prescribed reporting forms, the owner or operator of each hotel shall file either a statement of exemption, a claim of exemption based on low-income housing, a claim of exemption based on partially completed conversion, or an initial unit usage report as specified below. All filing shall be accompanied by supporting evidence. However, upon application by an owner or operator and upon showing a good cause therefor, the Superintendent of the Bureau of Building Inspection may grant an extension of time not to exceed 30 days for filing. Owner or operator shall post a notice on the day of filing that a copy of the initial status determination document filed with the Superintendent of the Bureau of Building Inspection is available for inspection between the hours of 9:00 a.m. and 5:00 p.m. Monday through Friday.

(b) **Filing of Initial Unit Usage Report.** All hotels not covered by the exemptions in Sections 41.5, 41.7 or 41.8 must file an initial unit usage report containing the following:

(1) The number of residential and tourist units in the hotel as of September 23, 1979;

(2) The designation by room number and location of the residential units and tourist units as of seven calendar days prior to the date of filing the report;

(3) The total number of residential and tourist rooms in the hotel as of seven calendar days prior to date of filing the report.

(c) **Insufficient Filing.** If the Superintendent of the Bureau of Building Inspection or his designee determines that additional information is needed to make a determination, the Superintendent shall request the additional information in writing. The owner or operator shall furnish the requested information within 15 calendar days upon receipt of the written request. Owner or operator shall immediately post a notice that a copy of the requested information is available for inspection between the hours of 9:00 a.m. and 5:00 p.m. Monday through Friday at the Bureau of Building Inspection. If the requested information is not furnished, all the guest rooms not supported by evidence shall be deemed to be residential units.

(d) **Certification of Units.** The Superintendent of the Bureau of Building Inspection shall review the information and accompanying supporting data. A certified copy of hotel tax returns for the calendar year 1979 may

be used to establish the number of tourist units and the Superintendent of the Bureau of Building Inspection or the Superintendent's designee may personally inspect units to establish the number of tourist units. If, in the opinion of the Superintendent of the Bureau of Building Inspection, the initial unit usage report is supported by adequate supporting evidence, the Superintendent shall certify the number of residential and tourist units within 90 calendar days of its submission. The owner or operator shall have the burden of proving the number of tourist units claimed by a preponderance of evidence.

Notwithstanding any other provisions in this Chapter, if an owner or operator took possession of the hotel operation after September 23, 1979 and before June 15, 1981, and if the owner or operator can demonstrate that good cause exists why he/she cannot obtain supporting evidence from the previous owner or operator to file the initial report, the owner or operator shall base his/her filing on information available to him/her two weeks after he/she took possession of the hotel; any units which are vacant on that date shall be allocated equally between tourist and residential uses; provided that a permanent resident may rebut this presumption by clear and convincing evidence.

After the Superintendent of the Bureau of Building Inspection certifies the number of residential and tourist units, the Superintendent shall issue a certificate of use. The Certificate of Use shall be posted permanently in the lobby or entranceway of the hotel.

(e) **Failure to File Statement of Exemption. Claim of Exemption or Initial Unit Usage Report.** If no initial

unit usage report, or statement of exemption, or a claim of exemption based on partially completed conversion, or a claim of exemption based on low-income housing for all of the guest rooms, is filed for a hotel within the time set forth in Section 41.6(a), the Superintendent of Bureau of Building Inspection shall mail a notice to the owner or operator of record by registered or certified mail stating that all the rooms in the hotel shall be deemed residential units unless the owner or operator files unit usage report within 10 calendar days of the mailing date of said notice and that a late filing fee of $50 will be assessed in addition to the fee set forth in Section 41.11 of this Chapter. If the owner or operator fails to submit a unit usage report within 10 calendar days after notification by the Bureau of Building Inspection, a certificate of use for residential units only shall be issued.

(f) **Appeal of Initial Determination.** An owner or operator may appeal the initial unit status determination by the Superintendent of the Bureau of Building Inspection provided that there was no challenge pursuant to the provisions of subsection (g) below, and further provided that an appeal is filed within 10 calendar days of the mailing of the certification. If an appeal is filed, a copy of the notice of appeal shall be posted by the owner or operator and a hearing pursuant to the provisions of Section 41.8(b) shall be scheduled.

(g) **Challenge; Standing; Statute of Limitation.** Challenges to the information contained in the initial status determination report filed by the owner or operator may be filed by an interested party in writing provided that it is submitted within 15 calendar days from the date the report to the Bureau of Building Inspection is

filed. Upon receipt of a challenge, a hearing shall be held by the Superintendent of the Bureau of Building Inspection or his designee pursuant to the provisions of Section 41.11(b). The owner or operator shall have the burden of proving by a preponderance of evidence that the information filed is correct.

(h) **Reporting Forms for Initial Unit Usage Report.** Compliance by any party or by the City of San Francisco with notice, filing, challenge, designation of unit and certification requirements of Ordinance 330-81 regarding the initial status of units shall satisfy similar requirements set forth in this Chapter and all such notices, filings, challenges, designations or certificates shall have the same force and effect as if made pursuant to this subsection. (Added by Ord. 121-90, App. 4/12/90)

SEC. 41.7. STATEMENTS OF EXEMPTION; APPLICABILITY OF THIS CHAPTER. (a) **Statement of Exemption Based on Inapplicability of This Chapter.** Any hotel claiming that this Chapter does not apply, under the provisions of Sections 41.5(a) through 41.5(d), shall file a statement of exemption specifying the basis for the exemption. Any hotel claiming exemption under the provisions of Sections 41.5(b) through 41.5(d) shall also state the total number of guest rooms and the number of residential hotel units with monthly rent over $1,000 per month.

(b) **Claim of Exemption Based on Low-Income Housing.** To qualify for a claim of exemption based on low-income housing, the units to be rehabilitated meet the following requirements:

(1) A claim for this exemption has been filed and the requisite fees paid to the Bureau of Building Inspection no later than 60 calendar days after the effective date of this ordinance;

(2) With the exception of ground floor commercial space, the entire building must be completely occupied as low-income housing;

(3) The Superintendent of the Bureau of Building Inspection finds that the proposed elimination of a unit is necessary to comply with Building Code and Housing Code requirements; and

(4) Alternate guest rooms are made available within the building to the displaced permanent residents; or

(5) In those circumstances where it is necessary to relocate a permanent resident off site, the permanent resident shall receive the actual moving expenses and the difference between the rent at the time of relocation and the rent of the temporary housing during the period of rehabilitation.

(6) The owner or operator and successors in interest shall continue to maintain all units in the rehabilitated hotel as low-income housing for 25 years. A deed restriction on such use shall be submitted to the City Attorney's Office for approval. An approved copy of the deed restriction shall be forwarded to the Superintendent of the Bureau of Building Inspection and the original shall be filed with the Recorder by the owner or operator.

(c) **Claim of Exemption Based on Partially Completed Conversion.** A claim of exemption based on partially completed conversion shall not be approved until

and unless owner or operator shows that all of the following requirements are met:

(1) An application for partially completed conversion was filed no later than 60 calendar days after the effective date of this ordinance;

(2) The owner or operator has commenced work on extensive Capital Improvements and Rehabilitation Work prior to November 23, 1979, as defined in Section 37.2 of the San Francisco Administrative Code (the San Francisco Rent Stabilization and Arbitration Ordinance) and has completed such work on at least 35 percent of the units intended to be converted or has expended 40 percent of the total sum budgeted for said work;

(3) The owner or operator or previous owner or operator shall have clearly demonstrated his/her intention to convert all of the residential units in the subject building to tourist units as of November 23, 1979. Satisfactory evidence of intention to convert may be demonstrated by the following factors, including but not limited to:

(A) Whether an architect has been engaged to prepare plans and specifications; or

(B) Whether applications for construction work have been received; or

(C) Whether applications for the necessary permits have been submitted to all relevant city departments; or

(D) Whether a building permit has been issued.

(4) Each permanent resident displaced by the conversion is offered relocation assistance as set forth in Section 41.17(b) below; and

(5) For each vacant residential unit converted, but not occupied by a permanent resident, a sum of $250 per unit not to exceed a total of $10,000 shall be deposited in the San Francisco Residential Hotel Preservation Account of the Repair and Demolition Fund established pursuant to Section 203.1 of the San Francisco Building Code (being Chapter 1, Article 2, Part II of the San Francisco Municipal Code) to be used exclusively for the repair, purchase and rehabilitation of residential hotel units by agencies of the City and County of San Francisco and to be administered by the Department of Public Works.

(d) Consistent with Planning Code Section 183, any unit deemed to be a tourist unit which has remained continuously vacant for three years following the zoning change in a zoning district not allowing tourist hotels shall lose its nonconforming status, and may be opened only for residential hotel or group housing uses. (Added by Ord. 121-90, App. 4/12/90)

SEC. 41.8. REQUIREMENTS FOR NONPROFIT ORGANIZATIONS. (a) **Initial Unit Usage Report.** Within 90 days of the adoption of this amended Chapter, the Bureau of Building Inspection shall notify all nonprofit organizations operating hotels that the nonprofit organization must comply with the Initial Status Determination provisions of Section 41.6 herein.

(b) **Annual Unit Usage Report.** All nonprofit organizations operating hotels with residential units shall comply with the provisions of Section 41.10 herein in the

event that the status of the units in the hotel changes from the designation contained in the Initial Unit Usage Report.

(c) **One-for-one Replacement.** If a nonprofit organization seeks to demolish residential units or remove residential units from housing use, or sells or otherwise transfers the building containing residential use, it shall comply with the provisions of Section 41.13 of this Chapter.

(d) **Applicability of this Chapter.** This chapter shall not apply to a hotel which has a certificate of use for all residential units but contained no permanent residents on September 23, 1979, provided that the hotel is owned, leased or operated by a nonprofit organization at the time this exemption is sought. The owner, operator or lessee of such a hotel must file with the Superintendent evidence to support such exemption. If the exemption is approved, the Superintendent shall issue a certificate of use designating all the hotel's units as tourist units; provided, however, that the certificate shall not be issued until the hotel owner, operator or lessee has paid any penalties imposed under Section 41.6(e) or Section 41.10(f) or (g), or released any liens imposed under Section 41.20(d). (Added by Ord. 121-90, App. 4/12/90)

SEC. 41.9. RECORDS OF USE. (a) **Daily Log.** Following the effective date of this Chapter each residential hotel shall maintain a daily log containing the status of each room, whether it is occupied or vacant, whether it is used as a residential unit or tourist unit and the name under which the occupant is registered. Each hotel shall also maintain copies of rent receipts showing the amount

and period paid for. The daily log shall be available for inspection pursuant to the provision of Section 41.11(c) of this Chapter upon demand by the Superintendent of the Bureau of Building Inspection or the Superintendent's designee between the hours of 9 a.m. and 5 p.m., Monday through Friday unless the Superintendent of the Bureau of Building Inspection and the City Attorney reasonably believe that further enforcement efforts are necessary for specified residential hotels, in which case the Bureau of Building Inspection shall notify the hotel owner or operator that the daily logs shall be available for inspection between the hours of 9 a.m. and 7 p.m.

(b) **Weekly Report.** Following the initial determination, an owner or operator of residential units shall post on each Monday before 12 noon the following information:

(1) The number of tourist units to which the owner or operator is currently entitled and the date the certificate of use was last issued;

(2) The number of guest rooms which were used as tourist units each day of the preceding week. Evidence of compliance with requirements imposed hereunder shall be preserved by the owner or operator for a period of not less than two years after each posting is required to be made. The owner or operator shall permit the Superintendent of the Bureau of Building Inspection or his designee to inspect the hotel records and other supporting evidence to determine the accuracy of the information posted. (Added by Ord. 121-90, App. 4/12/90)

SEC. 41.10. ANNUAL UNIT USAGE REPORT. (a) **Filing.** On November 1st of each year every hotel owner

or operator subject to this Chapter shall file with the Bureau of Building Inspection an Annual Unit Usage Report containing the following information:

(1) The total number of units in the hotel as of October 15th of the year of filing;

(2) The number of residential and tourist units as of October 15th of the year of filing;

(3) The number of vacant residential units as of October 15th of the year of filing; if more than 50 percent of the units are vacant, explain why;

(4) The average rent for the residential hotel units as of October 15th of the year of filing;

(5) The number of residential units rented by week or month as of October 15th of the year of filing; and

(6) The designation by room number and location of the residential units and tourist units as of October 15th of the year of filing. Owner or operator shall maintain such designated units as tourist or residential units for the following year unless owner or operator notifies in writing the Bureau of Building Inspection of a redesignation of units; owner or operator may redesignate units throughout the year provided they notify the Bureau of Building Inspection in writing by the next business day following such redesignation and maintain the proper number of residential and tourist units at all times. The purpose of this provision is to simplify enforcement efforts while providing owner or operator with reasonable and sufficient flexibility in designation and renting of rooms;

(7) The nature of services provided to the permanent residents and whether there has been an increase or decrease in the services to provided;

(8) A copy of the Daily Log, showing the number of units which are residential, tourist or vacant on October 1st, February 1st, May 1st and August 1st of the year of filing.

(b) **Notice of Annual Unit Usage Report.** On the day of filing, the owner or operator shall post a notice that a copy of the Annual Unit Usage Report submitted to the Bureau of Building Inspection is available for inspection between the hours of 9:00 a.m. and 5:00 p.m. Monday through Friday, which notice shall remain posted for 30 days.

(c) **Extension of Time for Filing.** Upon application by an owner or operator and upon showing good cause therefor, the Superintendent of the Bureau of Building Inspection may grant one extension of time not to exceed 30 days for said filing.

(d) **Certificate of Annual Unit Usage Report.** After receipt of a completed Annual Unit Usage Report, the Bureau of Building Inspection shall issue a certified acknowledgement of receipt.

(e) **Renewal of Hotel License and Issuance of New Certificate of Use.** As of the effective date of this Chapter, no hotel license may be issued to any owner or operator of a hotel unless the owner or operator presents with his/her license application a certified acknowledgement of receipt from the Bureau of Building Inspection of the Annual Unit Usage Report for the upcoming year.

(f) **Insufficient Filing: Penalties.** The Superintendent of the Bureau of Building Inspection authorized to assess a penalty as set forth below for insufficient filing, with interest on the penalty accruing at the rate of one and one-half percent per full month, compounded monthly from the date the penalty is due as stated in the Superintendent's written notification below.

If the Superintendent or the Superintendent's designee determines that additional information is needed to make a determination, he shall send both the owner and operator a written request to furnish such information within 15 calendar days of the mailing of the written request. The letter shall state that if the requested information is not furnished in the time required, the residential and tourist units shall be presumed to be unchanged from the previous year and that the Superintendent shall impose a $500 penalty for failure to furnish the additional information within the 15-day period. If the Superintendent does not timely receive the information, the Superintendent shall notify both the owner and operator, by mail, that the Superintendent is imposing a $500 penalty which must be paid within 30 days of the mailing of the notification, and that interest on the penalty shall accrue from the expiration of the 30 days at the rate of one and one-half percent per full month, compounded monthly. The written notification shall state that if the penalty is not paid, a lien to secure the amount of the penalty, plus the accrued interest, will be recorded against the real property pursuant to the provisions of Section 41.20(d) of this Chapter.

(g) **Failure to File Annual Unit Usage Report; Penalties.** The Superintendent of the Bureau of building

Inspection is authorized to assess penalties as set forth below for failure to file an Annual Unit Usage Report, with interest on penalties accruing at the rate of one and one-half percent per full month, compounded monthly from the date the penalty is due as stated in the Superintendent's notification below.

If the owner of operator fails to file an Annual Unit Usage Report, the Superintendent or the Superintendent's designee shall notify the owner and operator by registered or certified mail and shall post a notice informing the owner and operator that unless submission of the Annual Unit Usage Report and application for renewal of the hotel license is made within 15 calendar days of the mailing of the letter, the residential and tourist units shall be presumed to be unchanged from the previous year, and the Superintendent shall impose a penalty of $300 per month of each month the annual report is not filed. If the Superintendent does not receive the report the Superintendent shall notify both the owner and operator, by mail that the Superintendent is imposing the appropriate penalty, as prorated, which must be paid within 30 days of the mailing of the notification and that interest on the penalty shall accrue from the expiration of the 30 days at the rate of one and one-half percent per full month, compounded monthly. The written notification shall state that if the penalty is not paid, a lien to secure the amount of the penalty, plus the accrued interest, will be recorded against the real property pursuant to the provisions of Section 41.20(d) of this Chapter.

(h) **Appeal of Annual Usage Determination.** An owner or operator may appeal the annual unit usage determination by the Superintendent of the Bureau of

Building Inspection provided that there was no challenge pursuant to the provisions of subsection (i) below, and further provided that an appeal is filed within 20 calendar days from the date of annual unit usage determination. If an appeal is filed, a copy of the notice of appeal shall be posted by the owner or operator and a hearing pursuant to the provisions of Section 41.11(b) shall be scheduled.

(i) **Challenge; Standing; Statute of Limitation.** Any interested party may file a challenge to the information contained in the annual unit usage report filed by the owner or operator provided that such a challenge is in writing and is submitted within 30 calendar days from the date the report to the Bureau of Building Inspection is filed. Upon receipt of a challenge, a hearing pursuant to the provisions of Section 41.11(b) shall be scheduled. The owner or operator shall have the burden of proving by a preponderance of evidence that the information filed is correct. (Added by Ord. 121-90, App. 4/12/90)

SEC. 41.11. ADMINISTRATION. (a) Fees. The owner or operator shall pay the following filing fees to the Bureau of Building Inspection to cover its costs of investigating and reporting on eligibility. See Section 333.2, Hotel Conversion Fee Schedule, Part II, Chapter 1 of the San Francisco Municipal Code (Building Code) for the applicable fees. The party that brings an unsuccessful challenge to a report pursuant to this Article shall be liable for the change in Section 333.2, Hotel Conversion Fee Schedule. Unsuccessful Challenge, Part II, Chapter 1 of the San Francisco Municipal Code (Building Code). Fees shall be waived for an individual who files an affidavit under penalty of perjury stating that he or she is an

indigent person who cannot pay the filing fee without using money needed for the necessities of life.

SEE SAN FRANCISCO MUNICIPAL CODE (BUILDING CODE) SECTION 333.2 HOTEL CONVERSION FEE SCHEDULE

(b) **Hearing. (1) Notice of Hearing.** Whenever a hearing is required or requested in this Chapter, the Superintendent of the Bureau of Building Inspection shall, within 45 calendar days, notify the owner or operator of the date, time, place and nature of the hearing by registered or certified mail. The Superintendent of the Bureau of Building Inspection shall appoint a hearing officer. Notice of such a hearing shall be posted by the Bureau of Building Inspection. The owner or operator shall state under oath at the hearing that the notice remained posted for at least 10 calendar days prior to the hearing. Said notice shall state that all permanent residents residing in the hotel may appear and testify at the public hearing, provided that the Bureau of Building Inspection is notified of such an intent 72 hours prior to the hearing date.

(2) **Pre-hearing Submission.** No less than three working days prior to any hearing, parties to the hearing shall submit written information to the Bureau of Building Inspection including, but not limited to, the following: the request or complaint, the statement of issues to be determined by the Hearing Officer; and a statement of the evidence upon which the request or complaint is based.

(3) **Hearing Procedure.** If more than one hearing for the same hotel is required, the Superintendent of the Bureau of Building Inspection shall consolidate all of the appeals and challenges into one hearing; however, if a civil action has been filed pursuant to the provisions of Section 41.20(e) of the Chapter, all hearings on administrative complaints of unlawful conversions involving the same hotel shall be abated until such time as final judgment has been entered in the civil action; an interested party may file a complaint in intervention. The hearing shall be tape recorded. Any party to the appeal may, at his/her own expense, cause the hearing to be recorded by a certified court reporter. The hearing officer is empowered to issue subpoenas upon application of the parties seven calendar days prior to the date of the hearing. During the hearing, evidence and testimony may be presented to the hearing officer. Parties to the hearing may be represented by counsel and have the right to cross-examine witnesses. All testimony shall be given under oath. Written decision and findings shall be rendered by the hearing officer within twenty working days of the hearing. Copies of the findings and decision shall be served upon the parties to the hearing by registered or certified mail. A notice that a copy of the findings and decisions is available for inspection between the hours of 9:00 a.m. and 5:00 p.m. Monday through Friday shall be posted by the owner or operator.

(4) **Administrative Review.** Unless otherwise expressly provided in this Chapter, any decision of the hearing officer shall be final unless a valid written appeal is filed with the Board of Permit Appeals within 15 days

following the date of the hearing officer's written determination. Such an appeal may be taken by any interested party as defined by Section 41.4(g) herein.

(c) **Inspection.** The Superintendent of the Bureau of Building Inspection shall conduct, from time to time, on-site inspections of the daily logs, other supporting documents and units listed as vacant in the daily logs to determine if owner or operator has complied with the provisions of this Chapter. In addition, the Superintendent of the Bureau of Building Inspection or the Superintendent's designee shall conduct such an inspection as soon as practicable upon the request of a permanent resident of the hotel. If upon such an inspection, the Superintendent or the Superintendent's designee determines that an apparent violation of the provisions of this Chapter has occurred, he/she shall post a notice of apparent violation informing the permanent residents of the hotel thereof or shall take action as set forth in Section 41.11(d) and (e) below. This notice shall remain posted until the Superintendent of the Bureau of Building Inspection, or the Superintendent's designee, determines that the hotel is no longer in violation of the provisions of this Chapter.

(d) **Criminal Penalties for Violations.** Any person or entity wilfully failing to maintain daily logs as provided in Sections 41.9(a) and (b) of this Chapter, or failing to post materials as provided in Sections 41.6(a), (c) and (f), 41.9(b), 41.10(b), (g) and (h), 41.11(b)(3), 41.12(b)(10) and 41.18(b) and (c) of this Chapter or wilfully providing false information in the daily logs shall be guilty of an infraction for the first such violation or a misdemeanor for any subsequent violation, and the complaint charging

such violation shall specify whether the violation charged is a misdemeanor or an infraction.

If charged as an infraction, the penalty upon conviction therefor shall be not less than $100 or more than $500.

If charged as a misdemeanor, the penalty upon conviction therefor shall be a fine of not less than $500 or more than $1,000 or imprisonment in the county jail, not exceeding six months, or both fine and imprisonment.

Every day such violation shall continue shall be considered as a new offense.

For purposes of Sections 41.11(d) and (e), violation shall include, but to limited to, intentional disobedience, omission, failure or refusal to comply with any requirement imposed by the aforementioned Sections or with any notice or order of the Superintendent or the Director of Public Works regarding a violation of this Chapter.

(e) **False Information Misdemeanor.** It shall be unlawful for an owner or operator to wilfully provide false information to the Superintendent of the Bureau of Building Inspection or the Superintendent's designees. Any owner or operator who files false information shall be guilty of a misdemeanor. Conviction of a misdemeanor hereunder shall be punishable by a fine of not more than $500 or by imprisonment in the County Jail for a period not to exceed six months, or by both.

(f) The Superintendent of the Bureau of Building Inspection may impose a penalty of $250 per violation for failure to maintain daily logs as required under Section 419 above and for failure to post materials as required

under Sections 41.6(a), (c) and (f), 41.9(b), 41.10(b), (g) and (h), 41.11(b)(3), 41.12(b)(10), and 41.18(b) and (c). In order to impose such penalties, the Superintendent shall notify both the owner and operator by certified mail that the Superintendent is imposing the penalty or penalties, which must be paid within 30 days of the mailing of the notification. The written notification shall state that if the penalty is not paid, a lien to secure the amount of the penalty will be recorded against the real property pursuant to the provisions of Section 41.20(d) of this Chapter.

(g) **Costs of Enforcement.** The proceeds from the filing fees and civil fines assessed shall be used exclusively to cover the costs of investigation and enforcement of this ordinance by the City and County of San Francisco. The Superintendent of the Bureau of Building Inspection shall annually report these costs to the Board of Supervisors and recommend adjustments thereof.

(h) **Inspection of Records.** The Bureau of Building Inspection shall maintain a file for each residential hotel which shall contain copies of all applications, exemptions, permits, reports and decisions filed pursuant to the provisions of this Chapter. All documents maintained in said files, except for all tax returns and documents specifically exempted from the California Public Record Act, shall be made available for public inspection and copying.

(i) **Promulgation of Rules and Regulations.** The Superintendent of the Bureau of Building Inspection shall propose rules and regulations governing the appointment of an administrative officer and the administration and enforcement of this Chapter. After reasonable notice and

opportunity to submit written comment are given, final rules and regulations shall be promulgated. (Added by Ord. 121-90, App. 4/12/90)

SEC. 41.12. PERMIT TO CONVERT. (a) Any owner or operator, or his/her authorized agent, of a residential hotel may apply for a permit to convert one or more residential units by submitting an application and the required fee to the Central Permit Bureau.

(b) The permit application shall contain the following information:

(1) The name and address of the building in which the conversations are proposed; and

(2) The names and addresses of all owners or operators of said building; and

(3) A description of the proposed conversion including the nature of the conversion, the total number of units in the building, their current uses; and

(4) The room numbers and locations of the units to be converted; and

(5) Preliminary drawings showing the existing floor plans and proposed floor plans; and

(6) A description of the improvements or changes proposed to be constructed or installed and the tentative schedule for start of construction; and

(7) The current rental rates for each residential unit to be converted; and

(8) The length of tenancy of the permanent residents affected by the proposed conversion; and

(9) A statement regarding how one-for-one replacement of the units to be converted will be accomplished, including the proposed location of replacement housing if replacement is to be provided off-site; and

(10) A declaration under penalty of perjury from the owner or operator stating that he/she has complied with the provisions of Section 41.14(b) below and his/her filing of a permit to convert. On the same date of the filing of the application, a notice that an application to convert has been filed shall be posted until a decision is made on the application to convert.

(c) Upon receipt of a completed application to convert or demolish, the Bureau of Building Inspection shall send the application to the Department of City Planning for review and shall mail notice of such application to interested community organizations and such other persons or organizations who have previously requested such notice in writing. The notice shall identify the hotel requesting the permit, the nature of the permit, the proposal to fulfill the replacement requirements of Section 41.13 herein, and the procedures for requesting a public hearing. Owner or operator shall post a notice informing permanent residents of such information.

(d) Any interested party may submit a written request within 15 days of the date notice is posted pursuant to subsection (c) above to the City Planning Commission to schedule and conduct a public hearing on the proposed conversion in order to solicit public opinion on whether to approve or deny a permit to convert or demolish residential units and to determine whether proposed replacement units are "comparable units" as

defined in Section 41.4(b) herein. (Added by Ord. 121-90, App. 4/12/90)

SEC. 41.13. ONE-FOR-ONE REPLACEMENT. (a) Prior to the issuance of a permit to convert, the owner or operator shall provide one-for-one replacement of the units to be converted by one of the following methods:

(1) Construct or cause to be constructed a comparable unit to be made available at comparable rent to replace each of the units to be converted; or

(2) Cause to be brought back into the housing market a comparable unit from any building which was not subject to the provisions of this Chapter; or

(3) Construct or cause to be constructed or rehabilitated apartment units for elderly, disabled or low-income persons or households which may be provided at a ratio of less than one-to-one; or construct or cause to be constructed transitional housing which may include emergency housing. The construction of any replacement housing under this subsection shall be evaluated by the City Planning Commission in accordance with the provisions of Section 303 of the City Planning Code. A notice of said City Planning Commission hearing shall be posted by the owner or operator 10 calendar days before the hearing; or

(4) pay to the City and County of San Francisco an amount equal to 80 percent of the cost of construction of an equal number of comparable units plus site acquisition cost. All such payments shall go into a San Francisco Residential Hotel Preservation Fund Account. The

Department of Real Estate shall determine this amount based upon two independent appraisals; or

(5) Contribute to a public entity or nonprofit organization, who will use the funds to construct comparable units, an amount at least equal to 80 percent of the cost of construction of an equal number of comparable units plus site acquisition cost. The Department of Real Estate shall determine this amount based upon two independent appraisals. In addition to compliance with all relevant City ordinances and regulations, the public entity or nonprofit organization and the housing development proposal of such public entity or nonprofit organization shall be subject to approval by the Mayor's Office of Housing.

(A) Such contribution shall be paid to the approved public entity or nonprofit organization in installments from an escrow account supervised by the Mayor's Office of Housing, upon application by such public entity or nonprofit organization to the Mayor's Office of Housing, for specified expenditures, including but not limited to site acquisition costs, architect's fees, and construction costs; such payment shall be approved by the Mayor's Office of Housing prior to release of funds.

(B) The permit to convert shall be issued by the City when owner or operator deposits the full amount of funds in an escrow account described in subsection 41.13(a)(5)(A) above, or provides other form of nonrefundable security acceptable to the City Attorney and the Mayor's Office of Housing.

(C) In the event that the public entity or nonprofit organization is unable to complete construction of the replacement housing, any unpaid amounts shall be

released to the City. All such funds shall go into a San Francisco Residential Hotel Preservation Fund Account.

(b) Any displaced permanent resident relocated to replacement units provided under Subdivision (a) above shall be deemed to have continued his occupancy in the converted unit for the purpose of administering Subsection (k) of Section 37.2 San Francisco Administrative Code (San Francisco Rent Stabilization and arbitration Ordinance).

(c) Any replacement units shall continue to be subject to the provisions of this Chapter.

(d) In the event that a completed application for a permit to convert is filed by a hotel owner or operator no later than the effective date of this amended Chapter, and such hotel owner or operator elects to provide one-for-one replacement of the residential units pursuant to Section 41.13(a)(4) or Section 41.13(a)(5) herein, the hotel owner or operator shall be obligated to pay to the City and County of San Francisco an amount equal to 40 percent of the cost of construction of an equal number of comparable units plus site acquisition cost, provided that such hotel owner or operator shall pay such amount to the City or provide to the City security for such payment in a form satisfactory to the Mayor's Office of Housing and the City Attorney within 90 days following the date that the Bureau of Building Inspection determines that the application for a permit to convert is complete, or, if necessary, 10 days following final action, including any appeals, by the Planning Commission or appellate body, or 10 days following the Department of Real Estate's determination of such amount, whichever occurs latest.

In the event that a hotel owner or operator elects to provide one-for-one replacements pursuant to Section 41.13(a)(2) or (a)(5) herein and the Mayor's Office of Housing has not approved a proposal or organization thereunder prior to the effective date of this amended Chapter, the Bureau of Building Inspection shall not reject such application as incomplete for such lack of information. If a hotel owner or operator applies for a permit to convert using the one-for-one replacement option described in 41.13(a)(2) or (a)(5) and the Mayor's Office of Housing does not approve a housing development proposal or a nonprofit organization, or such project fails to progress through no fault of the owner or operator, such applicant shall be permitted to provide one-for-one replacement pursuant to Section 41.13(a)(4) at 40 percent of the cost of construction of an equal number of comparable units plus site acquisition costs, provided that such applicant files the application under Section 41.13(a)(2) or (a)(5) no later than the effective date of this amended Chapter. The hotel owner or operator shall identify such housing proposal or nonprofit organization within 180 days of the effective date of this amended Chapter. In the event that the Mayor's Office of Housing finds that the permit applicant has acted in good faith in seeking a project, the Mayor's Office of Housing may exercise its reasonable discretion to extend the provisions of this subsection for an additional 180 days. In the event that a project approved by the Mayor's Office of Housing fails to move forward through no fault of the permit applicant, the applicant may substitute another project within six months of being notified by the Mayor's Office of Housing of a failure of the prior project to move forward. The

Mayor's Office of Housing may extend this period for an additional 180 days to identify such new proposal. The City shall issue a permit to convert under this subsection 41.13(d) only if the hotel owner or operator has either paid the 40-percent in lieu fee to the City pursuant to Section 41.13(a)(4) herein or complied with the requirements of Sections 41.13(a)(2) or (a)(5) as applicable. In the event that a hotel owner or operator has not complied with any of these requirements and the City has not issued a permit to convert or if the Mayor's Office of Housing has not found the hotel owner or operator has acted in good faith in seeking a project pursuant to subsections 41.13(a)(2) or (a)(5) or this subsection, no later than 180 days following the effective date of this amended Chapter, or such later date as herein provided, this Subsection 41.13(d) shall no longer be applicable, City shall refund any amounts deposited as security pursuant to the terms herein, and such hotel owner or operator shall comply with all applicable terms of this Chapter.

(e) When a residential unit is approved for conversion to another use pursuant to the provisions of Subsection 41.13(a)(2), (a)(4) or (a)(5) above, such unit shall not be deemed to be reconverted into a residential unit regardless of any interim uses after payment as set forth in Subsection 41.139a)(2), (a)(4) or (a)(5). (Added by Ord. 121-90, App. 4/12/90)

SEC. 41.14. MANDATORY DENIAL OF PERMIT to CONVERT. A permit to convert shall be denied by Superintendent of the Bureau or Building Inspection if:

(a) The requirements of Sections 41.12 or 41.13, above, have not been fully complied with;

(b) The application is incomplete or contains incorrect information;

(c) An applicant has committed unlawful action as defined in this Chapter within 12 months previous to the issuance for a permit to convert;

(d) The proposed conversion or the use to which the unit would be converted is not permitted by the City Planning Code. (Added by Ord. 121-90, App. 4/12/90)

SEC. 41.15. APPROVAL AND ISSUANCE OF PERMIT TO CONVERT. The Superintendent of the Bureau of Building Inspection shall issue a permit to convert, provided that:

(a) The requirements of Section 41.12 have been met;

(b) Evidence of compliance with the requirements of Section 41.13 has been submitted. Satisfactory evidence of compliance may be:

(1) A certification of final completion or permit of occupancy on the replacement housing; or

(2) A receipt from the City Treasurer that the in-lieu payment determined by the Department of Real Estate has been received; and

(3) Evidence of compliance with the requirements of Section 41.17 herein.

(c) The proposed conversion or the use to which the unit would be converted is permitted by the City Planning Code.

(d) Concurrent with the issuance of a permit to convert, the Superintendent of the Bureau of Building Inspection shall issue a new certificate of use which shall state the newly certified number of residential units and tourist units. (Added by Ord. 121-90, App. 4/12/90)

SEC. 41.16. APPEAL OF DENIAL OR APPROVAL OF PERMIT TO CONVERT. (a) Denial or approval of a permit application may be appealed to the Board of Permit Appeals, pursuant to Sections 8 et seq. Part III of the San Francisco Municipal Code.

(b) The owner or operator shall submit a statement under the penalty of perjury that he has notified all the affected permanent residents of his appeal and of the date, time and place of the hearing before the Board of Permit Appeals, seven calendar days prior to the scheduled hearing.

(c) The appellant shall have the burden of proving that the determination of the Superintendent of the Bureau of Building Inspection is invalid. (Added by Ord. 121-90, App. 4/12/90)

SEC. 41.17. RIGHTS OF PERMANENT RESIDENTS. (a) To apply for a permit to convert, an owner or operator of the hotel shall do the following:

(1) Any interested community organization and all permanent residents residing in said building at the time of an application for a permit to convert and thereafer shall be timely informed of all public hearings and administrative decisions concerning said conversion; said notice shall be posted by the owner or operator;

(2) A permanent resident has the right to occupy his/her residential unit for 60 calendar days from the issuance of the permit to convert;

(3) owner or operator shall offer a permanent resident available comparable units in the building, or to any replacement housing provided pursuant to Subsection 41.13(a)(1) or (2);

(4) All displaced permanent residents are entitled to relocation assistance as provided for in subsection (b) below;

(5) Seven calendar days prior to the filing of an application for a permit to convert, the owner or operator shall notify, in writing, by personal service, or registered or certified mail, every permanent resident affected by the proposed conversion of his/her intent to convert designated units;

(6) The notification required by Subsection (5) above shall also inform the permanent residents of their rights under Subsections (1) through (4) above.

(b) **Relocation Assistance.**

(1) A permanent resident, who as a result of the conversion of his/her unit must relocate off site, shall be reimbursed the actual moving expenses not to exceed $300 or may consent to be moved by the owner or operator.

(2) A displaced permanent resident shall have the right of first refusal for the rental or leasing of replacement units, if any, provided pursuant to the provisions of Sections 41.13(a)(1) or 41.13(a)(2).

(3) A permanent resident displaced by partially completed conversion under the provisions of Section 41.7(c) shall be entitled to a displacement allowance of $1,000 per displaced person. (Added by Ord. 121-90, App. 4/12/90)

SEC. 41.18. DEMOLITION. (a) This section shall apply only to demolition of residential hotel buildings pursuant to an abatement order of the Director of Public Works or the Superior Court of the State of California, or demolition necessitated by major fires, natural causes or accidents where the cost of repair exceeds 50 percent of the replacement value of the building.

(b) Upon submission of an application for a demolition permit, the owner or operator shall post a copy of said application.

(c) Upon notification by the Central Permit Bureau that a demolition permit has been issued, the owner or operator shall post a notice explaining the procedure for challenging the issuance of the demolition permit to the Board of Permit Appeals.

(d) When issued a demolition permit, the owner or operator shall provide a written notice of the demolition within 10 calendar days of issuance of the permit to each residential permanent resident. Each permanent resident shall be notified in writing of his/her rights to relocation assistance and to occupy the same unit for a period of up to 60 days after issuance of the demolition permit.

(e) The subsequent issuance of a building permit for construction on the demolished site shall be conditioned on the owner or operator's agreement to replace, on a

one-for-one basis, the demolished *residential units as* required by the provisions of Section 41.13. No building permit shall be issued until owner or operator complies with the provisions of Section 41.13.

(f) The conditions for issuance of a demolition permit set forth in subsection (e) above shall be recorded by the owner at the time of issuance of the demolition permit in order to provide notice of said conditions to all subsequent purchasers and interested parties. (Added by Ord. 121-90, App. 4/12/90)

SEC. 41.49. TEMPORARY CHANGE OF OCCUPANCY. (a) Temporary Change of Occupancy

(1) A tourist unit may be rented to a permanent resident, until voluntary vacation of that unit by the permanent resident or upon eviction for cause, without changing the legal status of that unit as a tourist unit.

(2) A residential unit which is vacant at any time during the period commencing on May 1st and ending on September 30th annually may be rented as a tourist unit, provided that (i) the residential unit was vacant due to voluntary vacation of a permanent resident or was vacant due to lawful eviction for cause after the permanent resident was accorded all the rights guaranteed by State and local laws during his/her tenancy, (ii) the daily log shows that the residential unit was legally occupied for at least 50 percent of the period commencing on October 1st and ending on April 30th of the previous year, unless owner or operator can produce evidence to the Bureau of Building Inspection explaining such vacancy to the satisfaction of the Bureau of Building Inspection, including but not limited to such factors as repair or rehabilition

work performed in the unit or good faith efforts to rent the unit at fair market value; and (iii) the residential unit shall immediately revert to residential use upon application of a prospective permanent resident.

25-percent Limit.

However, at no time during the period commencing on May 1st and ending on September 30th may an owner or operator rent for nonresidential use or tourist use more than 25 percent of the hotel's total residential units unless the owner or operator can demonstrate that (i) the requirements of 41.19(a)(2) herein are met, (ii) good faith efforts were made to rent such units to prospective permanent residents at fair market value for comparable units and that such efforts failed and (iii) the owner or operator has not committed unlawful action as defined in this Chapter within 12 months prior to this request. Owners or operators who seek to exceed this limit must request a hearing pursuant to Section 41.11(b) above and the decision whether to permit owners or operators to exceed this limit is within the discretion of the hearing officer.

(b) **Special Requirements for Hearings on Tourist Season Rental of Residential Units.** Where an owner or operator seeks a hearing in order to exceed the limit on tourist season rental of vacant residential units pursuant to Section 41.19(a)(2), the requirements of 41.11(b)(1), (b)(2) and (b)(3) above shall be applicable except as specifically modified or enlarged herein:

(1) **Notice of Hearing.** Notice of hearing as provided in Section 41.11(b)(1) above shall be given within

15 calendar days. The notice requirements for the owner or operator shall also be applicable to any interested party who has submitted a prior written request to the Superintendent to be notified of such hearings.

(2) **Time of Hearing.** The hearing shall be held within 30 days of the submission of the owner or operator's written request for hearing.

(3) **Burden of Proof.** Burden of proof is on the owner or operator.

(4) **Interested Party.** Any interested party shall be deemed a "party to the hearing" for purposes of Section 41.11(b)(1).

(5) **Determination of the Hearing Officer.** Based upon the evidence presented at the hearing, conducted in accordance with Section 41.11(b)(3) above, the hearing officer shall make findings as to (i) whether the residential unit was vacant due to voluntary vacation of a permanent resident or was vacant due to lawful eviction. (ii) whether the residential unit was occupied for at least 50 percent of the period commencing on October and ending on April 30th of the previous year, (iii) whether the owner or operator has committed unlawful action under this Chapter within 12 months prior to this request, and (iv) whether the owner or operator made good faith efforts to rent vacant residential units to prospective permanent residents at no more than fair market value for a comparable unit during the tourist season and yet was unable to secure such rentals. Good faith efforts shall include, but not be limited to, advertising the availability of the residential units to the public. In determining fair market value of the residential units, the hearing officer

shall consider any data on rental of comparable units, as defined in Section 41.4(b) herein.

(6) **Decision.** The hearing officer shall render a written decision and findings within 10 working days of the hearing.

(7) **Effect of Decision.** The hearing officer's decision shall remain in effect for the tourist season for which the owner or operator requested the hearing. If the owner or operator wishes to exceed the 25 percent limit during any subsequent tourist season, a new written request for hearing must be submitted to the Superintendent of the Bureau of Building Inspection.

(8) **Construction.** The purpose of this Section 41.19(b) is to supplement or modify provisions of Section 41.11(b)(1) through (b)(3). Unless otherwise specifically modified, all provisions of Sections 41.11(b)(1) through (b)(3) are deemed applicable to hearings concerning the tourist season limitation on rental of vacant residential units.

(c) **Winter Rentals.** A residential unit which is vacant at any time during the period commencing on October 1 and ending on April 30th annually may be rented as a tourist unit, provided that:

(1) Such owner or operator has been permitted to rent residential units as tourist units in excess of 25 percent of the residential units pursuant to Section 41.19(a)(2) above;

(2) The owner or operator has not committed unlawful action as defined in this Chapter within 12 months prior to the time of this request;

(3) A residential hotel may not rent in excess of 33 percent of the total number of residential units or 20 residential units, whichever is less, pursuant to this subsection;

(4) Applicants to temporarily convert residential units pursuant to this subsection shall submit applications to the Department of Public Works, in accordance with rules and regulations promulgated by the Department of Public Works;

(5) A maximum of 60 residential units may be approved per year to be rented as tourist units or nonresidential units pursuant to this subsection 41.19(c). In the event that the number of such applications exceeds 60 residential units, the Department of Public Works shall establish a lottery system based on priority ranking where preference shall be accorded to residential hotel owners who have been eligible more frequently than other hotel owners for temporary conversion pursuant to Subsection 41.19(a)(2) above;

(6) Such nonresidential use is permitted by the zoning for such residential hotel; and

(7) No application for such temporary conversion shall be approved by the Department of Public Works to fill the unused portion of the 60 residential unit limitation for the previous year. (Added by Ord. 121-90, App. 4/12/90)

SEC. 41.20. UNLAWFUL CONVERSION; REMEDIES; FINES.

(a) **Unlawful Actions.** It shall be unlawful to:

(1) Change the use of, or to eliminate a residential hotel unit or to demolish a residential hotel unit except pursuant to a lawful abatement order, without first obtaining a permit to convert in accordance with the provisions of this Chapter;

(2) Rent any residential unit for a term of tenancy less than seven days except as permitted by Section 41.19 of this Chapter;

(3) Offer for rent for nonresidential use or tourist use a residential unit except as permitted by this Chapter.

(b) **Hearing for Complaints of Unlawful Conversions.** Upon the filing of a complaint by an interested party that an unlawful conversion has occurred and payment of the required fee, the Superintendent of the Bureau of Building Inspection shall schedule a hearing pursuant to the provisions of Section 41.11(b). The complainant shall bear the burden of proving that a unit has been unlawfully converted. The hearing officer shall consider, among others, the following factors in determining whether a conversion has occurred:

(1) Shortening of the term of an existing tenancy without the prior approval of the permanent resident;

(2) Reduction of the basic services provided to a residential unit intended to lead to conversion. For the purpose of this section, basic services are defined as access to common areas and facilities, food service, housekeeping services and security;

(3) Repeated failure to comply with order of the Bureau of Building Inspection or the Department of Public Health to correct code violations with intent to cause the permanent residents to voluntarily vacate the premises;

(4) Repeated citations by the Superintendent of the Bureau of Building Inspection or the Department of Public Health of code violations;

(5) Offer of the residential units for nonresidential use or tourist use except as permitted in this Chapter;

(6) Eviction or attempts to evict a permanent resident from a residential hotel on grounds other than those specified in Sections 37.9(a)(1) through 37.9(a)(8) of the San Francisco Administrative Code except where a permit to convert has been issued;

(7) Repeated posting by the Superintendent of the Bureau of Building Inspection of notices of apparent violations of this Chapter pursuant to Section 41.11(c) above.

(c) **Civil Penalties.** Where the hearing officer finds that an unlawful conversion has occurred, the Superintendent shall impose a civil penalty of three times the daily rate per day for each unlawfully converted unit from the day the complaint is filed until such time as the unit reverts to its authorized use. The daily rate shall be the rate unlawfully charged by the hotel owner or operator to the occupants of the unlawfully converted unit. The Superintendent may also impose penalties upon the owner or operator of the hotel to reimburse City or

complainant for the costs of enforcement, including reasonable attorneys' fees, of this Chapter. The hearing officer's decision shall notify the parties of this penalty provision and shall state that the Superintendent of the Bureau of Building Inspection is authorized to impose the appropriate penalty by written notification to both the owner and operator, requesting payment within 30 days. If the penalty imposed is not paid, a lien to secure the amount of the penalty will be recorded against the real property pursuant to the provisions of Section 41.20(d) of this Chapter.

(d) **Lien Proceedings.**

(1) **Preparation of Delinquency Report.** If any penalty imposed pursuant to Sections 41.10(d), 41.10(f), 41.11(f) or 41.20(c) is not received within the required time period, the Superintendent of the Bureau of Building Inspection shall initiate proceedings to make the penalty, plus accrued interest, a special assessment lien against the red property regulated under this Chapter. The Superintendent shall prepare a delinquency report for the Board of Supervisors. For each delinquent account, the report shall contain the owner's name, the amount due, including interest, and a description of the real property. The report shall also indicate which of the delinquent accounts should be exempted from the lien procedure because of the small amounts involved, or because another debt collection procedure is more appropriate. The descriptions of the parcels shall be those used for the same parcels on the Assessor's map books for the current year.

(2) **Notice.** Five days prior to forwarding the delinquency report to the Board of Supervisors, the Superintendent shall mail a copy of the report to any affected owner and shall post the report at the affected properties. Upon receipt of the report, the Board of Supervisors shall fix a time, date and place for hearing the report and any protest or objections thereto, and shall mail notice of the hearing to each owner of real property described in the report not less than 10 days prior to the date of hearing.

(3) **Hearing and Confirmation.** The Board of Supervisors shall hear the report with opportunity for any protests or objections of the owners of the real property liable to be assessed for delinquent accounts. The Board may make such revisions, corrections or modifications of the report as it may deem just, after which, by motion or resolution, it shall be confirmed. The Board's decision on the report on all protests or objections thereto shall be final and conclusive; provided, however, that any delinquent account may be removed from the report by payment in full at any time prior to confirmation of the report. The Clerk of the Board shall cause the confirmed report to be verified in form sufficient to meet recording requirements.

(4) **Collection of Assessment.** Upon confirmation of the report by the Board, the delinquent charges contained herein shall constitute a special assessment against the property listed in the report. Each such assessment shall be subordinate to all existing special liens previously imposed upon such property and paramount to all other liens except those for state, county and municipal taxes with which it shall be in parity. The lien shall continue until the assessment and all interest due and payable

thereon are paid. All laws applicable to the levy, collection and enforcement of municipal taxes shall be applicable to said special assessment.

(5) **Recordation; Charges.** The Clerk of the Board shall cause the confirmed and verified report to be recorded in the County Recorder's Office within 10 days of its confirmation. The special assessment lien on each parcel of property described in said report shall carry additional charges for administrative expenses of $100 or 10 percent of the amount of the unpaid balance, including interest, whichever is higher.

(6) **Filing with Controller and Tax Collector; Distribution of Proceeds.** After the report is recorded, the Clerk of the Board shall file a certified copy with the Controller and Tax Collector, whereupon it shall be the duty of said officers to add the amount of said assessment to the next regular bill for taxes levied against said parcel or parcels of land for municipal purposes, and thereafter said amount shall be collected at the same time and in the same manner as ordinary City and County taxes are collected, and shall be subject to the same penalties and the same procedure under foreclosure and sale in case of delinquency as provided for property taxes of the City and County of San Francisco. Except for the release of lien recording fee authorized in Subsection (7) below, all sums collected by the Tax Collector pursuant to this section shall be held in trust by the Treasurer and distributed as provided in Section 41.8(e) of this Chapter.

(7) **Release of Lien; Recording Fee.** Upon payment to the Tax Collector of the special assessment, the Tax Collector shall cause a Release Lien to be recorded with

the County Recorder, and from the sum collected pursuant to Subsection (6) above, shall pay to the County Recorder a recording fee of $6.00.

(e) **Civil Action.** An interested party may institute a civil proceeding for injunctive relief and damages. The Superintendent of the Bureau of Building Inspection may institute a civil proceeding for injunctive relief. Counsel for the interested party shall notify the City Attorney's office of the City and County of San Francisco of any action filed pursuant to this section. In determining whether an unlawful conversion has occurred, the court may consider, among other factors, those enumerated in Section 41.20(b) of this Chapter. The interested party instituting a civil proceeding, or the City suing to enforce this Chapter, if prevailing parties, shall be entitled to the costs of enforcing this Chapter, including reasonable attorney's fees, pursuant to an order of the Court. (Added by Ord. 121-90, App. 4/12/90)

SEC. 41.21. ANNUAL REVIEW OF RESIDENTIAL HOTEL STATUS.

(a) The Bureau of Building Inspection shall prepare and submit to the Board of Supervisors an annual status report containing the following:

(1) Current data on the number of residential hotels and the number of residential units in each of the residential hotels in the City and County of San Francisco, including, to the extent feasible, information regarding rents, services provided, and violations of the City's codes;

(2) Current data on the number of residential hotel units converted pursuant to a permit to convert;

(3) Current data on the number of hotel units demolished or eliminated due to code abatement proceedings and fire;

(4) Current data on the number of residential hotel units illegally converted;

(5) Current data on the number of replacement housing units rehabilitated or constructed;

(6) A summary of the enforcement efforts by all City agencies responsible for the administration of this Chapter; and

(7) An evaluation of the workability and effectiveness of the permitted temporary change of occupancy procedures and winter rentals in Section 41.19 herein; and

(8) A report on expenditures from the San Francisco Residential Hotel Preservation Fund Account.

(b) The Economic and Social Policy Committee of the Board of Supervisors shall conduct a hearing on the annual report submitted by the Bureau of Building Inspection and shall recommend appropriate actions to be taken by the Board of Supervisors.

(c) The Bureau of Building Inspection should establish a San Francisco Residential Hotel Operators Advisory Committee composed of:

– 3 members nominated by the San Francisco Hotel Association (for-profit operators);

– 3 members nominated by the Golden Gate Hotel Association (for-profit operators);

– 2 members nominated by the Council of Community Housing Organizations (nonprofit hotel operators);

– Deputy Mayor for Housing

The committee shall meet no less than once every three months to advise the Mayor's Office of Housing on matters including, but not limited to:

(1) Proposed revisions to this ordinance:

(2) Programs that various City agencies (i.e. Mayor's Office of Housing, Department of Social Services, etc.) should develop to assist the City's residential hotel operators;

(3) Any state or federal laws the City should support, oppose or seek to revise that impact residential hotel operators;

(4) Any new City, State or Federal programs the City shall encourage that would provide financial or technical support or assistance to San Francisco Residential Hotel Operators. (Added by Ord. 121-90, App. 4/12/90)

SEC. 4122. CONSTRUCTION. (a) Nothing in this Chapter may be construed to supersede any other lawfully enacted ordinance of the City and County of San Francisco, except that definitions provided in this Chapter shall govern the enforcement of this Chapter.

(b) Clauses of this Chapter are declared to be severable and if any provision or clause of this Chapter or the

application thereof is held to be unconstitutional or to be otherwise invalid by any court of competent jurisdiction, such invalidity shall not affect other provisions of this Chapter. (Added by Ord. 121-90, App. 4/12/90)

Supreme Court, U.S.
FILED
JUL 10 1996
CLERK

(2)

No. 95-1725

In The

Supreme Court of the United States

October Term, 1995

GOLDEN GATE HOTEL ASSOCIATION,

Petitioner,

v.

CITY AND COUNTY OF SAN FRANCISCO; TENDERLOIN HOUSING CLINIC, INC.; RANDALL M. SHAW; BRADFORD PAUL; NORTH OF MARKET PLANNING COALITION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a facial challenge to a local ordinance under the Takings Clause of the U.S. Constitution is timely when brought more than ten years after the ordinance was enacted.

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OPINIONS BELOW

Respondents disagree with petitioner's citation to the opinions below insofar as petitioners contend that the Orders of the District Court dated June 2 and September 9, 1993, set forth in petitioner's Appendix at 24a-61a, are at issue in this appeal. Those District Court Orders were vacated by the Ninth Circuit Court of Appeals in *Golden Gate Hotel Ass'n v. City and County of San Francisco*, 18 F.3d 1482 (9th Cir. 1994).

On remand, the District Court held that petitioner's facial taking challenge to San Francisco's Residential Hotel Conversion Ordinance was barred by the one-year statute of limitations. *See* petitioner's Appendix 4a-8a. The Ninth Circuit affirmed that decision, relying solely on the statute of limitations. *See* Memorandum Decision, petitioner's Appendix at 1a-3a. Neither the District Court nor the Ninth Circuit reached the merits of petitioner's facial taking claim.

CORRECTION OF MISSTATEMENT IN PETITION OF QUESTIONS PRESENTED

The Petition for Writ of Certiorari misstates the questions for review. The second question presented by petitioner – whether San Francisco's Residential Hotel Conversion Ordinance ("HCO") is unconstitutional on its face – is not before the Court. The District Court did not rule on the constitutionality of the HCO because the District Court found that petitioner's claim was time-barred. Accordingly, the only issue on appeal to the Ninth Circuit, and thus before this Court, is whether the statute

of limitations bars petitioner's facial taking claim. *See Youakim v. Miller*, 425 U.S. 231, 234 (1976) (Supreme Court generally does not decide questions not "involved" in or essential to lower court decision).

STATEMENT OF THE CASE

The petition should be denied because the decision below is consistent with the decisions of this Court, as well as every Circuit Court that has considered the issue, and does not raise an important question of law. The lower courts correctly applied the one-year statute of limitations under 42 U.S.C. § 1983 to petitioner's facial takings challenge to the City's ordinance. Under the applicable statute of limitations, petitioner's claim was untimely.

The relief petitioner seeks in this case is truly unprecedented: petitioner seeks a determination that a facial takings claim against state or local ordinances can be brought *at any time*. Petitioner argues that state and local governments should have no repose from facial takings claims, even if the suit is filed more than 100 years after a law is enacted. Such a radical position has no support in the case law or sound public policy.

In order to circumvent the statute of limitations bar, petitioner contends that it has a direct cause of action under the Takings Clause, resulting in a longer statute of limitations. However, every Circuit Court of Appeal that has addressed the issue has found that given the availability of 42 U.S.C. § 1983, no direct constitutional claim

against state or local government defendants exists under the United States Constitution.

Moreover, even if a direct constitutional claim independent of § 1983 were permitted, petitioner's action is still time-barred because it was filed more than ten years after enactment of the Residential Hotel Ordinance. Ten years is longer than any conceivably applicable statute of limitations. Accordingly, the petition should be denied.

Supreme Court Rule 15.2 now provides that a respondent's failure to point out misstatements of law or fact in the brief in opposition to a petition for a writ of certiorari could be deemed a waiver of an objection to any misstated matter should the Court grant the petition. Although the facts of this case are not relevant to this petition because petitioner's claim was properly dismissed as untimely, respondents nevertheless provide the Court with the correct background facts in compliance with Rule 15.2.

A. The Residential Hotel Ordinance.

In the years preceding 1979, the City and County of San Francisco ("City") faced a growing loss of rental housing. One major reason for this loss was the increasing conversion of residential hotel units to non-residential tourist use. After years of debate and study the City, in 1979, adopted ordinances designed to protect the existing residential housing stock by regulating future conversions of residential housing to non-residential uses.

In two separate ordinances, the City restricted the conversion of both apartment units and residential hotel units. As a result, all residential rental units in the City

became subject to restrictions on conversion to non-residential use. The Residential Hotel Unit Conversion and Demolition Ordinance ("HCO"), codified in Chapter 41 of the San Francisco Administrative Code, is at issue in this case. *See* petitioner's Appendix at 62a-117a. The purpose of the HCO is:

> to benefit the general public by minimizing adverse impact on the housing supply and on displaced low income, elderly, and disabled persons resulting from the loss of residential hotel units through their conversion and demolition.

HCO § 41.2; Petition at 62a-63a.

In its findings in support of the HCO, the San Francisco Board of Supervisors adopted a study by the Department of City Planning that concluded that almost 20% of residential hotel units in the City were lost between 1975 and 1979 due to demolition and conversion, primarily to tourist use. HCO §§ 41.3(d), (f), (k); Petition at 63a-65a.

The HCO took as its starting point the *actual use* of hotels on September 23, 1979, and only regulated *changes in use* after that date. HCO §§ 41.4(c), 41.6, 41.12, 41.13; Petition at 68a, 73a, 93a, 95a. Like traditional zoning controls, the HCO permits owners to continue the residential and tourist use in existence at the time of adoption of the HCO. *Id.*; *see also*, HCO § 41.4(s); Petition at 71a. However, residential units could thereafter be converted to non-residential use only if the owner obtained a permit to convert upon satisfying specified replacement housing conditions. HCO §§ 41.12, 41.13; Petition at 93a, 95a.

Petitioner completely mischaracterizes the HCO as requiring "certain landowners to place their private properties in public service as single room occupancy hotels

for indigents, without payment of any compensation." Petition at 3. In fact, the HCO does not shift the burden of providing housing onto owners. Like zoning, the HCO simply restricts subsequent changes in use; it permits the continuation of uses that existed at the time of enactment. Contrary to petitioner's contention, the HCO does not require owners to rent to anyone. The HCO operates just like residential zoning in that owners can comply with the lawful use restriction or sell to an owner who will.

The HCO is a rational legislative response to the loss of the City's limited housing stock. Since the enactment of the HCO in 1979, residential hotel owners have raised two Fifth Amendment challenges to the HCO in the California courts. In *Terminal Plaza Corp. v. City and County of San Francisco*, 177 Cal. App. 3d 892, 911-12 (1986), the California Court of Appeal rejected a challenge that the HCO on its face constituted a "taking" of property without just compensation. Four years later, the Court of Appeal again held that the HCO does not effect a facial taking of property without just compensation. *Bullock v. City and County of San Francisco*, 221 Cal. App. 3d 1072, 1089 (1990).

B. Petitioner's Facial Taking Claim.

On September 30, 1991, more than ten years after enactment of the HCO, petitioner Golden Gate Hotel Association, an association of San Francisco residential hotel owners, filed the instant lawsuit to declare the HCO facially unconstitutional as a taking of property without just compensation. Petitioner did not challenge the HCO as applied to a particular residential hotel. Respondents

timely filed answers and raised the statute of limitations as an affirmative defense.

In August 1994, the District Court granted respondents' motions for summary judgment based on the statute of limitations and entered judgment for respondents. Petitioner appealed the District Court's judgment that the facial taking claim is barred by the statute of limitations.

In a memorandum opinion issued on January 23, 1996, the Ninth Circuit affirmed the judgment. The Circuit Court found that petitioner's facial challenge to the 1979 HCO was barred by the one-year statute of limitations for § 1983 claims. Petitioner did not file a request for rehearing under Rule 40 or a petition for rehearing en banc under Rule 35 of the Federal Rules of Appellate Procedure. On April 22, 1996, petitioner filed the instant petition for a writ of certiorari.

REASONS FOR DENYING THE PETITION

This Court's Rules provide for certiorari only where (1) there is a conflict among the decisions of the court of appeals; (2) a court of appeals has decided an important question of federal law that should be settled by this Court; or (3) a court of appeals has decided an important question of law that conflicts with the decisions of this Court. Rules of the Supreme Court, Rule 10.

The instant petition satisfies none of these criteria. The lower courts concluded that petitioner's facial takings challenge to the HCO was barred under the applicable statute of limitations. The Ninth Circuit's decision in

this case does not conflict with any decision of this Court or any other Circuit Court of Appeals. Moreover, the Ninth Circuit's decision did not raise an "important" legal question, but only applied the established statute of limitations to bar petitioner's claim.

The statute of limitations for a challenge to a state or local regulation under the U.S. Constitution in California is one year. *Wilson v. Garcia*, 471 U.S. 261, 276 (1985); *Golden Gate Hotel Ass'n v. City and County of San Francisco*, 18 F.3d 1482, 1485 (9th Cir. 1994). Because petitioner filed its complaint challenging the HCO on its face more than ten years after the HCO was enacted, the Court of Appeals correctly dismissed petitioner's claim as untimely.

I. THE DECISION OF THE NINTH CIRCUIT DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER CIRCUIT COURT OF APPEALS.

In order to avoid the bar of the one-year statute of limitations applicable to actions under 42 U.S.C. § 1983, petitioner argues that it can bring a facial taking challenge to the HCO directly under the United States Constitution. Petitioner further contends that there is no statute of limitations applicable to such actions.

Petitioner's argument has been rejected by every court that has addressed the issue. All have found that claims arising under the Constitution must be brought pursuant to 42 U.S.C. § 1983. *See, e.g., Ward v. Caulk*, 650 F.2d 1144, 1147 (9th Cir. 1981) ("Ward has no cause of action on the federal constitution claims because the defendants he wishes to hold liable are all amenable to suit under 42 U.S.C. § 1983"); *Thomas v. Shipka*, 818 F.2d 496, 503 (6th Cir. 1987) (court rejects plaintiff's assertion

of direct claim under Constitution and holds that § 1983 provides the exclusive remedy for plaintiff's constitutional claims); *Hunt v. Robeson County Dep't of Social Services*, 816 F.2d 150, 152 n.2 (4th Cir. 1987) (cause of action against local officials for unconstitutional conduct could only proceed under § 1983); *Rogin v. Bensalem Township*, 616 F.2d 680, 686 (3rd Cir. 1980), *cert. denied*, 450 U.S. 1029 (1981) (no direct constitutional claim where § 1983 is available); *Bishop v. Tice*, 622 F.2d 349, 357 (8th Cir. 1980) (same); *Turpin v. Mailet*, 591 F.2d 426, 427 (2d Cir. 1979), *cert. denied*, 449 U.S. 1016 (1980) (same); *Kostka v. Hogg*, 560 F.2d 37, 44 (1st Cir. 1977) (en banc) (same); *see also, Morris v. Washington Metropolitan Area Transit Auth.*, 702 F.2d 1037, 1042 (D.C. Cir. 1983) ("unlikely" that direct constitutional remedy is implied). Accordingly, there is no conflict among the Circuit Court of Appeals warranting review.

II. THE DECISION OF THE NINTH CIRCUIT IS CONSISTENT WITH THIS COURT'S DECISIONS.

A. The Decision Below Is Consistent With This Court's Holding That All Civil Rights Actions Against Nonfederal Defendants Must Be Brought Pursuant To § 1983.

In order to escape the bar of the one-year statute of limitations under § 1983, petitioner argues that its facial taking claim is not subject to § 1983. Petitioner contends that a longer statute of limitations than one year should apply to its direct action under the U.S. Constitution. There is no merit to this argument.

Rather than conferring inferior status on the Takings Clause as petitioner's contend, this Court has treated the protections afforded under the Takings Clause equal to other rights guaranteed in the Bill of Rights. All such claims against state or local defendants must be brought pursuant to § 1983. In other words, the Court has assumed that such claims must be based on § 1983. *See, e.g., Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 182, 192 (1985).

Indeed, the very purpose of § 1983 was to provide a plaintiff with a remedy for a violation of a federal constitutional right by a state or local government. This Court has never held that a takings challenge to nonfederal regulation may be brought directly under the United States Constitution.

The statute of limitations applicable in § 1983 actions applies to *all* civil rights actions against state or local public agencies. *Wilson v. Garcia*, 471 U.S. 261, 271-72 (1985). In *Wilson*, the Court concluded that a uniform statute of limitations for all actions alleging state violations of federal constitutional rights best served the objectives of repose and certainty that are "the central purposes of § 1983." *Id.*, at 271-72. The Court stated:

> [I]n considering whether all § 1983 claims should be characterized in the same way for limitations purposes, it is useful to recall that § 1983 provides "a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation."

Id. at 271-72 (*quoting Mitchum v. Foster*, 407 U.S. 225, 239 (1972)).

Accordingly, to allow a direct cause of action to enforce federal constitutional rights against state action – subject to a different statute of limitations than all other civil rights actions – would undermine *Wilson* and the intent of Congress in enacting § 1983. Petitioner's exclusive remedy against the City under the Takings Clause of the federal constitution is by way of § 1983.

Contrary to petitioner's contention, the decision in this case is also consistent with this Court's decision in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987). In *First English*, the Court was presented with the question of whether plaintiff could recover money damages – not merely injunctive relief – for a regulatory taking under the Fifth Amendment. The language in *First English* about the "self-executing character" of the Takings Clause related solely to whether the Fifth Amendment applies to inverse condemnation proceedings. *See id.*; Petition at 12. There is no discussion in the opinion regarding the proper statute of limitations or whether a remedy exists beyond § 1983.

First English does not hold or even suggest that lawsuits for inverse condemnation claims can be brought directly under the Constitution. The opinion is entirely consistent with the requirement that constitutional claims against non-federal defendants must be brought pursuant to § 1983.

Petitioner also cites *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), *Davis v. Passman*, 442 U.S. 228 (1979), and *Carlson v. Green*, 446 U.S. 14 (1980) for the proposition that plaintiffs may sue directly under the Constitution. Petition at p. 16 n.4. However, in *Bivens*, *Davis*, and *Carlson*, the Court held only that plaintiffs had a direct cause of action under the

Constitution against federal defendants. In those cases the plaintiffs were not entitled to relief under § 1983 or another protective statute. The absence of any other means of redress was a major factor in the Court's finding a right of action directly from the Constitution. Such an implied remedy is unnecessary in this case against non-federal defendants where § 1983 is available to prosecute claims.

B. The Decision Of The Circuit Court Is Consistent With This Court's Decisions That A Facial Taking Claim Accrues At The Time The Challenged Regulation Is Adopted.

As an alternative argument, petitioner contends that the harm inflicted by the HCO is continuing. According to petitioner, no statute of limitations should apply to its facial taking claim. Petitioner confuses facial with as-applied takings challenges.

A facial takings claim is based on the contention that the "mere enactment" of the regulation effects a taking. *See, e.g., Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). Petitioner's argument that the HCO inflicts ongoing, daily violations of hotel owners' constitutional rights simply ignores the important distinction between facial and as-applied claims. As the Ninth Circuit stated in *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680 (9th Cir. 1993), *cert. denied*, 127 L.Ed.2d 217 (1994):

> This argument misapprehends the differences between a statute that effects a taking and a statute that inflicts some other kind of harm. In other contexts, the harm inflicted by the statute is continuing, or does not occur until it is

> applied. In the takings context, the basis of a facial challenge is that the very enactment of the statute has reduced the value of the property or has effected a transfer of a property interest. This is a single harm, measurable and compensable when the statute is passed. Thus, it is not inconsistent to say that different rules adhere in the facial takings context and other contexts.

Id. at 688.[1]

Citing three cases of this Court, petitioner asserts that: "[i]t has long been the practice of this Court to strike down facially unconstitutional laws and prohibit their enforcement, without regard to the date of their enactment." Petition at 10-11. Petitioner's contention fails scrutiny.

Notably, in the three cases cited by petitioner, the statute of limitations was not even raised, much less

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[1] This Court has observed that facial takings challenges are heavily disfavored. *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 494 (1987); *see also, Pennell v. City of San Jose*, 485 U.S. 1, 10 (1988). As the Court stated in *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981):

> [T]he court below ignored this Court's oft-repeated admonition that the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary. . . . Adherence to this rule is particularly important in cases raising allegations of an unconstitutional taking of private property. . . . These "ad hoc, factual inquiries" must be conducted with respect to specific property, and the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances.

Id. at 294-95 (citation omitted).

addressed by the Court. Moreover, all of the cases involved specific applications of challenged statutes to individual parties; none of the cases involved a facial takings claim. The decision in this case is fully consistent with this Court's prior rulings.

III. EVEN IF PETITIONER'S FACIAL TAKING CLAIM COULD BE BROUGHT DIRECTLY UNDER THE CONSTITUTION, IT WOULD BE TIME-BARRED.

Assuming the Court were to find that a taking claim could be made directly under the Constitution, petitioner's claim in this case would still be time-barred. Because the Constitution does not provide a statute of limitations, the Court generally adopts the analogous state statute of limitations. *See Wilson v. Garcia*, 471 U.S. at 266-267, n.12. The limitations period for inverse condemnation claims in California is five years. *Frustuck v. City of Fairfax*, 212 Cal. App. 2d 345, 374 (1963). The most analogous federal statute of limitations is six years under 28 U.S.C. § 2401.

Petitioner's complaint was filed more than ten years after the HCO was enacted in 1979. *See Golden Gate Hotel Ass'n v. City and County of San Francisco*, 18 F.3d at 1483-84 (HCO originally enacted in 1979; "The Ordinance was reenacted in substantially the same form in January 1981 and again, in a slightly modified form, in May 1990"); *see also, De Anza Properties X, Ltd. v. County of Santa Cruz*, 936 F.2d 1084, 1086 (9th Cir. 1991) (statute of limitations commences upon adoption of first ordinance where plaintiff

"experienc[es] substantially the same injury" from reenacted ordinance). Thus, whether viewed as a § 1983 claim or a direct claim under the Constitution, petitioner's facial taking claim is still time-barred.

Barring petitioner's facial takings challenge to the HCO does not result in any injustice to petitioner. Even though a facial taking claim was found to be time-barred, the application of the HCO to any of plaintiff's members may be challenged at any time. If, as petitioner contends, the HCO is facially unconstitutional – that is, it cannot be applied constitutionally in any set of circumstances – the defect can be raised through an as-applied challenge by any of petitioner's members. Thus, petitioner's statement that "the facially unconstitutional ordinance could be enforced in perpetuity" is without basis. Petition at 3.

Permitting a facial taking claim to be brought in perpetuity without regard to any statute of limitations would be unsound policy for the additional reason that public entities would be subject to unlimited claims for alleged takings that occurred fifteen, twenty, or two hundred years ago. Like everyone else, government is entitled to repose from stale claims. *See Wilson v. Garcia*, 471 U.S. at 271. If forced to defend facial taking claims for every law or ordinance that was ever enacted, government simply could not function. Allowing government repose does not constitute special treatment of Takings Clause cases, but merely equal treatment.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Dated: July 10, 1996

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